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The Wacky World of Collision & Comprehensive Coverages: Intentional Injury & Illegal Activity Exclusions

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The Wacky World of Collision and Comprehensive Coverages: Intentional Injury and Illegal Activity Exclusions

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I. INTRODUCTION

Insurance has been variously defined,¹ classified,² and packaged around the nature of the risk being transferred and res protected.

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1. There is no universally accepted definition of insurance. Nevertheless, it is generally accepted that the most distinguishing feature of an insurance transaction is that it is an "arrangement for transferring and distributing risks." ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES*, § 1.1(b), at 3 (student ed. 1988).
2. Historically, insurance contracts were classified on the basis of the nature of the risk being transferred. Consequently, three broad classes of insurance gained prominence. "These three main classes of insurance are commonly referred to as 'fire and marine,' 'life and accident,' and 'casualty' insurance." *Id.* Rule 2.4 § 1.5(a), at 18. The advent of the automobile has led to the development of a fourth classification. Most insurance contracts are, however, packaged policies. A packaged policy combines a number of individual property, liability, and medical insurance coverages into a single policy. For example, a typical automobile

Within any specific classification, however, the principal themes of risk transference and management are manifested in the insurance contract to suit the risk tolerance level of the particular company underwriting the risk of loss. An insurance company's particular risk tolerance level is primarily reflected in any one or combination of three sections of the insurance contract. Those sections are the exclusions, limits of liability, and conditions provisions.³ Because risk tolerance levels are unique to each company, these sections, more so than any other in an insurance contract, are likely to be the most varied and distinctive feature of the final product — the insurance policy. Variations are specifically reflected in the terminology used in specific provisions or in the conceptualization of the scope of the risk covered.

Within no classification or type of insurance, however, is there greater variation in terms of terminology, scope of coverage, and exclusions than in automobile insurance contracts. Variations in these provisions of the automobile insurance contract are so extensive that resolution of automobile insurance disputes is especially fact-sensitive.⁴ Therefore, litigating parties in automobile insurance disputes

insurance contract customarily provides liability, medical, and property coverages in addition to other types of protection.

3. Insurance contracts, in general, almost always begin with "statements describing a broad scope of protection which is then reduced or limited by various types of restrictive provisions," such as those listed above. *Id.* § 4.1(a), at 286. Exclusions, limits of liability, and condition provisions are not the exclusive tools used by insurers to limit the risks transferred. *See id.* It is not uncommon for insurers to attempt to limit the risks transferred in the general coverage provisions of the policy. Courts have viewed this practice with a great deal of skepticism. Consequently, it is generally agreed that insurance coverage provisions are to be construed broadly in favor of the existence of coverage and exclusions are to be construed narrowly against the insurance company. *See, e.g.,* American States Ins. Co. v. Martin, 662 So. 2d 245 (Ala. 1995); Whispering Creek Condominium Owner Ass'n v. Alaska Nat'l Ins. Co., 774 P.2d 176 (Alaska 1989); Averett v. Farmers Ins. Co., 869 P.2d 505 (Ariz. 1994); FMC Corp. v. Plaisted & Co., 72 Cal. Rptr. 2d 467 (Cal. Ct. App. 1998); Progressive Ins. Co. v. Estate of Wesley, 702 So. 2d 513 (Fla. Dist. Ct. App. 1997); Johnston Equip. Corp. v. Industrial Indem., 489 N.W.2d 13 (Iowa 1992); Central Sec. Mut. Ins. Co. v. DePinto, 681 P.2d 15 (Kan. 1984); State Farm Fire & Cas. Co. v. White, 993 S.W.2d 40 (Tenn. Ct. App. 1998).
4. *See* Pacific Indem. Co. v. Truck Ins. Exch., 76 Cal. Rptr. 281, 283 (Cal. Ct. App. 1969) ("American decisions considering repair and maintenance as a 'use' reach disparate results dictated by variations in the facts or policy provisions."); AIG Haw. Ins. Co. v. Vicente, 891 P.2d 1041, 1048 (Haw. 1995) ("We must note, however, that because decisions in this area are extremely fact-sensitive, the presence or absence of one additional factor may change the result."); Belas v. Melanovich, 372 A.2d 478, 480 (Pa. Super. Ct. 1977) ("The decisions in this area often appear to be delicately balanced on the peculiar facts of the individual cases." (quoting Gillen v. Globe Indem. Co., 377 F.2d 328, 333 (8th Cir. 1967)).

In *Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13 (Mo. Ct. App. 1980), the court observed in frustration:

frequently are unable to cite apposite case law.⁵ Variations in policy terminology, scope, and the fact-sensitive nature of automobile insurance litigation hamper continuity in the application of traditional insurance doctrines, principles, and practices.⁶ Consequently, there remain many issues upon which courts are left to write on clean slates.⁷

Over the past decade, a number of insurance companies have experimented with limiting their risk exposure for comprehensive damage to an insured vehicle by relying upon an exclusion within Part D-Coverage For Damage To Your Auto. This provision, commonly known as the illegal activity exclusion, provides that coverage does not apply to loss sustained while an insured person commits or attempts to commit a felony, or by the insured person's involvement in an illegal activity.⁸ This exclusion is a hidden landmine for the unwary insured. It provides the insurer, should it desire to deny coverage, at least a minimal basis for rejection of the claim if damage to the vehicle occurred while the insured was engaged in any illegal conduct. On the surface, such a denial might seem justified and morally correct to those overly sensitized by the number of illegal activities that occur involving automobiles. However, the illegal activity exclusion should not be examined solely from the perspective of the extreme case. Rather, it should also be considered from the perspective of the indi-

The experience of assimilating divergent fact situations into the basic legal construction given such insuring agreements has produced an array of peripheral principles which are frequently relied upon for determining the existence or nonexistence of coverage under automobile liability insurance policies The parties on appeal have indiscriminately cited a number of cases reflecting these peripheral principles, with virtually no attention given to distinguishing them factually. At best, they are of nebulous value absent being conceptually categorized. An attempt to do so reveals that this court is writing on a clean slate insofar as Missouri case law is concerned.

599 S.W.2d at 15.

5. See *supra* note 4.

6. It has been observed that a number of factors are important when coverage questions arise in automobile insurance; consequently, it is very "difficult to predict with certainty either exactly who will be insureds or under what circumstances persons will be entitled to coverage benefits." KEETON & WIDISS, *supra* note 1, § 4.9(a), at 386.

7. It is not uncommon for courts when addressing a novel issue concerning automobile insurance to begin the analysis with a general proposition of insurance law. A general proposition, however, should be distinguished from a rule of law. A general proposition is something offered for consideration or acceptance. It is not accorded the persuasive value of a rule of law and should be adhered to only in the clearest of cases. The substantive value of a legal proposition is analogous to that of the inference of negligence which flows out of a violation of statutes in a typical negligence action.

8. The illegal activity exclusion is founded upon the same public policy rationale as the intentional injury exclusion. For a detailed discussion, see *infra* Parts II and III.

vidual whose coverage is invalidated for traffic violations, such as (1) running a stop sign; (2) exceeding the speed limit; (3) operating a vehicle with defective equipment; or (4) driving while intoxicated. The primary inquiry of this article is whether the mere fact that (1) a vehicle has been used in an unlawful manner, or (2) an unlawful event may have occurred during its use by insured, should relieve an insurer from its obligation to provide comprehensive coverage.

The objective of this article is to develop an appropriate analytical basis for evaluating the illegal activity exclusion in the context of automobile comprehensive coverage. Because the illegal activity exclusion has not been the subject of any reported decision in the context of comprehensive coverage, this article attempts to achieve its goal by examining intentional injury and prohibitive use exclusions in the context of automobile liability and collision coverages, respectively. The purpose of this examination is to ascertain whether the analytical tools employed in the liability and collision coverages arenas are appropriate in the context of the primary thesis.

Part II of this article details the most significant provisions of automobile insurance contracts. This part, though primarily introductory in nature, reflects the skepticism with which courts view attempts by insurers to limit coverage in general. Part II explores the intentional injury exclusion in the context of automobile liability insurance. This part attempts to identify the methodologies used by courts in assessing the validity of the exclusion. Part II demonstrates how public policy influences the manner in which courts construe the intentional injury exclusion, and concludes that the analytical standards used to determine the validity of such exclusions reflect the policy concerns inherent in mandatory automobile liability insurance.

Part III examines prohibitive use restrictions contained in car rental agreements. Part III explores the relationship between collision damage waivers, prohibitive use provisions, and collision insurance policies in general. This part demonstrates that the validity of prohibitive use provisions contained in rental car agreements, though not technically insurance contracts, is determined according to general principles of insurance contract interpretation. Part III also details the analytical standards used by courts to assess the validity of prohibitive use restrictions.

Parts IV and V address the primary thesis. These parts document the relationship between collision and comprehensive coverages. They also examine the collision and comprehensive coverages insuring agreement. This insuring agreement affords coverage only for "direct and accidental loss." The primary thesis emanates out of the difficulty of formulating a universal all-inclusive definition of the term "accidental." Parts IV and V discuss the general rule that "accidental" for purposes of collision and comprehensive coverage is ascertained from the

perspective of the insured. It also recognizes the presumption of validity generally accorded to property coverages exclusions. This presumption, however, merely favors the rights of insurers to include such provisions in the respective coverages and does not determine whether such exclusions are enforceable in the context of a specific case. Two conclusions are reached. First, a case-by-case approach should be used to determine if an insurer is relieved from its obligation to provide comprehensive coverage when (1) a vehicle has been used in an unlawful manner, or (2) an unlawful event may have occurred during its use by an insured. Second, traditional tools of insurance contract interpretations should be used to determine whether an accident has occurred for purposes of comprehensive coverage.

II. AUTOMOBILE POLICY IN GENERAL

Automobile insurance policies are for the most part uniformly organized. They consist of the (1) declaration sheet; (2) agreement; (3) definition section; (4) Part A-Liability Coverage; (5) Part B-Medical Payments Coverage; (6) Part C-Uninsured Motorists Coverage; (7) Part D-Coverage For Damage To Your Auto; (8) Part E-Duties After An Accident or Loss; (9) Part F-General Provisions.⁹ The declaration sheet personalizes the policy with regard to the specific name and address of the insured, vehicle insured, policy period, limits of coverages, deductibles, premiums, and endorsements. The agreement component of the policy does little more than state that "[i]n return for payment of the premium and subject to all the terms of this policy, we agree with you as follows."¹⁰ The agreement section is followed by the definition component of the respective coverage. In this section of the policy, insurance companies attempt to clearly and unambiguously define the more important concepts as used in that particular coverage section.¹¹

Parts: A-Liability Coverage; B-Medical Payments Coverage; C-Uninsured Motorist Coverage; and, D-Coverage For Damage To Your Auto provide protections that are unique to the respective type of coverage. Each of these parts, however, contains an insuring agreement, and all but Part D contain an omnibus clause.¹² Both the insuring agreements and omnibus clauses in each of these coverages are sepa-

9. See INSURANCE SERVICES OFFICES, INC., PERSONAL AUTO POLICY (1985), reprinted in ALLIANCE OF AMERICAN INSURERS, 1989 POLICY KIT FOR STUDENTS OF INSURANCE 2-11 (1989) [hereinafter PERSONAL AUTO POLICY].

10. *Id.* at 2.

11. The definition section of the policy is not the only section of the policy in which definitions may be found. It is a common practice to place the definition of an extremely important term after the specific provision in which the term appears. This practice is also designed to provide clarity and to avoid ambiguity. For a detailed discussion of ambiguity, see *infra* Part IV.A.

12. See PERSONAL AUTO POLICY, *supra* note 9, at 3-9.

rate and independent agreements pertaining only to the specific coverages in which they appear.

Insurance companies enjoy the same rights as individuals to limit their liability and impose whatever conditions they deem appropriate upon their obligation to provide coverage in a contract of insurance. The right to freely contract, however, may not be exercised in a manner that violates public policy — either statutorily or judicially dictated. In principle, automobile insurance is designed to provide basic coverage for virtually every risk contingency that might reasonably arise out of the use or ownership of an automobile. However, "[a]t the same time certain limitations are imposed for the purpose of enabling the insurer to set premiums which will not make the cost of such a policy prohibitive."¹³ The interest in providing broad coverage while maintaining reasonable premiums has been accomplished through the use of exclusion provisions. Exclusions limit the scope of the coverage provided; they are to be read with the insuring agreement and independent of every other exclusion.¹⁴

The primary objective of the claims adjuster is to efficiently and fairly dispose of claims. To achieve this goal, the adjuster must determine whether the insured is entitled to the proceeds of the policy whenever a claim is filed. This is commonly referred to as the process of determining whether coverage exists under the policy. In order to determine whether coverage exists, the adjuster must carefully read the policy and consider three very simple questions: "1. Is the claim within the scope of an insuring agreement? 2. Does any exclusion eliminate or restrict coverage for the claim? 3. Do any policy conditions affect the coverage for the claim?"¹⁵ The "insuring agreement" represents the starting point for determining the existence of coverage.

The model automobile liability coverage insuring agreement provides that:

13. Gerald L. Walter, Jr., Note, 21 LA. L. REV. 835, 836 (1961).

14. See *Indiana Ins. Co. v. DeZutti*, 408 N.E.2d 1275 (Ind. 1980); *Southwest La. Grain, Inc. v. Howard A. Duncan, Inc.*, 438 So. 2d 215 (La. Ct. App. 1983); *Continental Cas. Co. v. Gilbane Bldg. Co.*, 461 N.E.2d 209 (Mass. 1984); *Hawkeye-Security Ins. Co. v. Vector Constr. Co.*, 460 N.W.2d 329 (Mich. Ct. App. 1990); *American State Ins. Co. v. Slogar*, No. C7-90-14, 1990 Minn. App. LEXIS 556 (Ct. App. May 30, 1990)(citing *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 681 P.2d 875, 880 (Wash. Ct. App. 1984)); *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979); *Engineered Prod., Inc. v. Aetna Cas. & Sur. Co.*, 368 S.E.2d 674 (S.C. Ct. App. 1988); *Standard Fire Ins. Co. v. Chester-O'Donley & Assoc., Inc.*, 972 S.W.2d 1 (Tenn. Ct. App. 1998); *T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692 (Tex. Ct. App. 1989); *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 681 P.2d 875 (Wash. Ct. App. 1984); *Weaver v. Drew*, No. 96-0454, 1996 Wisc. App. LEXIS 1304 (Ct. App. Oct. 15, 1996)(citing *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979)).

15. ROBERT J. PRAHL, INTRODUCTION TO CLAIMS 37 (1988).

A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include pre-judgment interest awarded against the "insured." We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.¹⁶

Insuring agreements are coverage provisions that define the scope of the protection afforded by the respective coverage. The insuring agreement, while seemingly unambiguous in its own right, is immediately followed by the omnibus clause and exclusion provisions of the respective coverage. The liability coverage omnibus clause is a coverage provision that extends the protection provided by the insuring agreement.¹⁷

"Omnibus clause" is a term of art frequently used in discussions of coverage provisions but rarely employed in insurance contracts. Rather, most insurance contracts identify persons who are covered as additional insureds in clauses placed in sections captioned or designated "persons insured," "definition of insureds," or "additional insureds." The omnibus clause identifies the persons insured for purpose of the specific type of coverage.¹⁸ It is common, however, for insurers to define "persons insured," "definition of insureds," or "addi-

16. PERSONAL AUTO POLICY, *supra* note 9, at 3.

17. See *Stearns-Roger Corp. v. Hartford Accident & Indem. Co.*, 571 P.2d 278 (Ariz. Ct. App. 1976); *Glens Falls Ins. Co. v. Globe Indem. Co.*, 81 Cal. Rptr. 28 (Cal. Ct. App. 1969); *Porterfield v. Truck Ins. Exch.*, 171 N.E.2d 108 (Ill. App. Ct. 1960); *Motorists Mut. Ins. Co. v. Johnson*, 218 N.E.2d 712 (Ind. App. 1966); *Maryland Cas. Co. v. Hassell*, 426 S.W.2d 133 (Ky. 1967); *Williams v. Forbes*, 650 So. 2d 337 (La. Ct. App. 1995); *Parker v. State Farm Mut. Auto. Ins. Co.*, 282 A.2d 503 (Md. 1971); *Travelers Indem. Co. v. Watkins*, 209 So. 2d 630 (Miss. 1968); *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623 (Mo. 1979); *Capece v. Allstate Ins. Co.*, 212 A.2d 863 (N.J. Super. Ct. Law Div. 1965); *infra* notes 18-21.

18. The vast majority of state legislatures have enacted compulsory automobile or motor vehicle liability insurance laws. These laws employ one or a combination of two statutory methods to mandate the inclusion of omnibus clauses in every policy of automobile or motor vehicle insurance. Before discussing these methods it should be noted that in some jurisdictions a legal distinction between "automobile liability policies" and "motor vehicle liability policies" is recognized. The former policies are said to be matters of individual choice and voluntarily purchased. The latter policies, however, are typically required in compliance with Motor Vehicle Safety Responsibility Statutes and purchased as proof of financial responsibility. Because "automobile liabilities policies," unlike motor vehicle liability policies, are not required to be certified they are not subject to the requirements of the financial responsibility laws. See, e.g., *Gray v. Maryland Cas. Co.*, 152 F. Supp. 520 (E.D. Ill. 1957); *Hearty v. Harris*, 574 So. 2d 1234 (La. 1991); *Perkins v. Perkins*, 284 S.W.2d 603 (Mo. Ct. App. 1955); *Lewis v. Mid-Century Ins. Co.*, 449 P.2d 679 (Mont. 1968); *USF&G v. Walker*, 329 P.2d 852 (Okla. 1958); *Novak v. State Farm Mut. Auto. Ins. Co.*, 293 N.W.2d 452 (S.D. 1980).

tional insureds" differently for purposes of the various coverages. However, insurers may not define the term "insured" or its equivalent

Motor Vehicle Safety Responsibility Statutes (MVSRS) and Compulsory or Mandatory Liability Statutes (MLS) are the contrivances most employed by state legislatures to mandate the inclusion of omnibus clauses in liability policies affecting motor vehicles. It is not uncommon to find both sources mandating omnibus clause inclusion in a single jurisdiction. *See* ARIZ. REV. STAT. 29-4009 (West 1998 & Supp. 1999); CAL. INS. CODE § 11580.1 (West 1971 & Supp. 2000); CAL. VEH. CODE § 16451 (West 1971 & Supp. 2000); HAW. REV. STAT. § 287-25(2) (1993 & Supp. 1998); HAW. REV. STAT. § 431:10C-301(a); MONT. CODE ANN. § 61-6-103 (1999); *id.* § 61-6-301; OKLA. STAT. ANN. tit. 47, § 7-324(b)(2) (West 2000); *id.* § 7-600(1)(b); VA. CODE ANN. § 38.2-2204(A) (Michie 1999); VA. CODE ANN. § 46.2-472 (Michie 1998 & Supp. 1999). MVSRS and MLS statutes are not inconsistent. The statutes serve different purposes and to some degree compliment each other. MLS insure that vehicles are insured at all times. MVSRS come into play after an accident has occurred and create leverage in favor of an individual injured by an uninsured driver. Together, MLS and MVSRS are designed to totally plug any holes that might otherwise exist in compulsory liability insurance law.

The vast majority of jurisdictions have ignored MLS; instead, they have utilized MVSRS to require the inclusion of omnibus clauses in motor vehicle liability policies. *See* ALA. CODE § 32-7-22(b)(2) (1999); ALASKA STAT. § 28.20.440(b)(2) (Michie 1998); ARIZ. REV. STAT. ANN. § 28-4009(A)(2) (West 1998 & Supp. 1999); ARK. CODE ANN. § 27-19-713(b) (Michie 1994 & Supp. 1999); COLO. REV. STAT. § 42-7-413(b) (1999); DEL. CODE ANN. tit. 21, § 2902 (1995 & Supp. 1998); FLA. STAT. ANN. § 324.151 (West 1995 & Supp. 2000); IDAHO CODE § 49-1212 (1994); 625 ILL. COMP. STAT. ANN. 5/7-317 (West 1993 & Supp. 1999); IOWA CODE ANN. § 321A.21 (West 1997 & Supp. 1999); KAN. STAT. ANN. § 40.3107 (1993 & Supp. 1998); LA. REV. STAT. ANN. § 32:900 (West 1989 & Supp. 1999); ME. REV. STAT. ANN. tit. 24-A, § 2902-D (West Supp. 1999); MISS. CODE ANN. § 63-15-43(2)(b) (1999); MO. ANN. STAT. § 303.190(2) (West 1994 & Supp. 2000); NEV. REV. STAT. § 485.3091(b) (1997); N.Y. VEH. & TRAF. LAW § 345(b)(2) (McKinney 1996 & Supp. 1999-2000); N.C. GEN. STAT. § 20-279.21(b)(2) (1993 & Cum. Supp. 1998); N.D. CENT. CODE § 39-16.1-11 (1997); OHIO REV. CODE ANN. § 4509.51(b) (Anderson 1999); OR. REV. STAT. § 806.080 (1997 & 1998 Cum. Supp.); TENN. CODE ANN. § 55-12-122 (1998); TEX. TRANSP. CODE ANN. § 601.076 (West 1999); WASH. REV. CODE ANN. § 46.29.490 (West 1987 & Supp. 2000); W. VA. CODE § 17D-4-12 (1996 & Supp. 1999); WIS. STAT. ANN. § 344.33 (West 1999); WYO. STAT. ANN. § 31-9-405(b)(ii) (Michie 1999). *But see* UTAH CODE ANN. § 31A-22-303 (1999) (requiring the inclusion of the omnibus clause in the Liability Insurance Statute).

In jurisdictions in which the inclusion of an omnibus clause is not statutorily mandated in automobile liability insurance contracts, courts use a general public policy analysis to justify construing omnibus clauses liberally. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Jackson, 462 So. 2d 346 (Ala. 1984); Alliance Mut. Cas. Co. v. Hartford Accident & Indem. Co., 504 P.2d 161 (Kan. 1972); Miller v. State Farm Mut. Auto. Ins. Co., 466 P.2d 336 (Kan. 1970). *But see* National Grange Mut. Ins. Co. v. Pinkney, 399 A.2d 877 (Md. 1979) (refusing to construe omnibus clause liberally in the absence of a statute mandating inclusion); Milbank Mut. Ins. Co. v. USF&G, 332 N.W.2d 160 (Minn. 1983); USF&G v. Bonner, 467 So. 2d 955 (Miss. 1985); Universal Underwriters Ins. Co. v. Taylor, 408 S.E.2d 358 (W. Va. 1991).

in Part C-Uninsured Motorist Coverage more restrictively than it is defined in the omnibus provision of Part A-Liability Coverage.¹⁹

Omnibus coverage is generally provided to others on the basis of their relationship with the named insured. For example, motor vehicle liability insurance contracts usually include a clause providing that "covered person" or "person insured" means, in addition to the "named insured" shown in the declaration, the "spouse" of a named insured if a resident of the same household, any "family member" who is a resident of that household, and "relatives" who reside in the same household as the named insured. These individuals are also additional insureds for purposes of other coverages provided in the standard motor vehicle insurance policy.

The liability coverage omnibus clause not only identifies the insured(s) or person(s) covered²⁰ but also extends coverage to anyone driving the insured vehicle with the expressed²¹ or general permission of the named insured.²² Permission, for purposes of extended cover-

19. See, e.g., *State Farm Auto. Ins. Co. v. Reaves*, 292 So. 2d 95 (Ala. 1974); *Farmers Ins. Co. v. Schiller*, 597 P.2d 238 (Kan. 1979); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Gartelman*, 405 A.2d 779 (Md. Ct. App. 1979), *aff'd*, 416 A.2d 734 (Md. 1980).
20. The Insurance Services Office in its 1985 model automobile insurance policy defined "insured" for purposes of the liability omnibus clause as "[y]ou or any 'family member' for the ownership, maintenance or use of any auto or 'trailer,'" and as "[a]ny person using 'your covered auto.'" PERSONAL AUTO POLICY, *supra* note 9, at 3. "Insured" as defined in the above omnibus clause does not require a determination of whether someone other than the named insured or a family member had permission to use the covered auto for purposes of extended coverage. In egregious cases, such as where the permittee was engaged in conversion or the like, the issue of permission for purposes of the extended coverage under the model omnibus clause would probably surface. Because of the liberal nature of the model omnibus clause, the majority of insurance companies have opted to ignore it and instead provide extended coverage to anyone using the vehicle with the permission of the named insured. See *infra* notes 21 and 22.
21. Insurance companies, in the absence of statutory provisions to the contrary, have the same rights as other individuals to limit their liability and impose whatever conditions they please upon their obligations. The right of insurance companies to freely contract is further constrained by the requirement that the exercise of this right not violate public policy. Consequently, some insurance companies experienced initial success in limiting the extended coverage of the omnibus clause by requiring that the user of the automobile have the "express permission of the named insured." *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Mattison*, 243 So. 2d 490, 491 (Ala. 1971). In contrast, where the omnibus clause merely requires the "permission of the named insured," the permission necessary to trigger extended omnibus coverage can be expressed or implied from the circumstances. The majority of jurisdictions have either legislatively or judicially limited the right of insurance companies to restrict omnibus coverage. Consequently, the language used in omnibus clauses is now well standardized. See *supra* note 18.
22. Courts have adopted various views in determining the effect of a permissive user's use of the insured vehicle in excess of the permission granted. Despite being imprecise and at times abstract in nature, those views have been classified as follows:

(1) The liberal or "initial permission" rule provides that if a person has permission to use an automobile in the first instance, any subsequent use while it remains in her possession though not within the contemplation of the parties is a permissive use within the terms of the omnibus clause. The only limitation on this rule is that the subsequent use must not be equivalent to theft or the like. States which adhere to this view include Arkansas, *see, e.g.*, *Commercial Union Ins. Co. v. Johnson*, 745 S.W.2d 589 (Ark. 1988); California, *see, e.g.*, *Jordan v. Consolidated Mut. Ins. Co.*, 130 Cal. Rptr. 446 (Cal. Ct. App. 1976); Florida, *see, e.g.*, *Susco Car Rental System v. Leonard*, 112 So. 2d 832 (Fla. 1959); Illinois, *see, e.g.*, *Visintin v. Country Mut. Ins. Co.*, 222 N.E.2d 550 (Ill. App. Ct. 1966); Indiana, *see, e.g.*, *Hartford Ins. Co. v. Vernon Fire & Cas. Ins. Co.*, 485 N.E.2d 902 (Ind. Ct. App. 1985); Louisiana, *see, e.g.*, *Carey v. Ory*, 421 So. 2d 1003 (La. Ct. App. 1982); Minnesota, *see, e.g.*, *Milbank Mut. Ins. Co. v. USF&G*, 332 N.W.2d 160 (Minn. 1983); Montana, *see, e.g.*, *Cascade Ins. Co. v. Glacier Gen. Ins. Co.*, 479 P.2d 259 (Mont. 1971); Nebraska, *see, e.g.*, *Barry v. Tanner*, 250 Neb. 116, 547 N.W.2d 730 (1996); Nevada, *see, e.g.*, *USF&G v. Fisher*, 494 P.2d 549 (Nev. 1972); New Hampshire, *see, e.g.*, *GEICO v. Johnson*, 396 A.2d 331 (N.H. 1978); New Jersey, *see, e.g.*, *Rutgers Cas. Ins. Co. v. Collins*, 730 A.2d 833 (N.J. 1999); New Mexico, *see, e.g.*, *Kitchens v. Houston Gen. Ins. Co.*, 896 P.2d 479 (N.M. 1995); Oregon, *see, e.g.*, *Ryan v. Western Pac. Ins. Co.*, 408 P.2d 84 (Or. 1965); Tennessee, *see, e.g.*, *Estate of Adkins v. White Consol. Indus.*, 788 S.W.2d 815 (Tenn. Ct. App. 1989); West Virginia, *see, e.g.*, *Universal Underwriters Ins. Co. v. Taylor*, 408 S.E.2d 358 (W. Va. 1991).

(2) The moderate or "minor deviation" rule provides that a permittee is covered under the omnibus clause so long as her deviation from the permissive use is minor in nature. States which adhere to this view include Arizona, *see, e.g.*, *James v. Aetna Life & Cas.*, 546 P.2d 1146 (Ariz. Ct. App. 1976); Delaware, *see, e.g.*, *St. Paul Fire & Marine Ins. Co. v. West Am. Ins. Co.*, 437 A.2d 165 (Del. 1981); Kansas, *see, e.g.*, *Cimarron Ins. Co. v. Loftus*, 612 P.2d 1245 (Kan. Ct. App. 1980); Kentucky, *see, e.g.*, *Maryland Cas. Co. v. Hassell*, 426 S.W.2d 133 (Ky. 1967); Mississippi, *see, e.g.*, *Wade v. Bonner*, 409 So. 2d 1333 (Miss. 1982); North Carolina, *see, e.g.*, *Packer v. Travelers Ins. Co.*, 221 S.E.2d 707 (N.C. Ct. App. 1976); Ohio, *see, e.g.*, *Frankenmuth Mut. Ins. Co. v. Selz*, 451 N.E.2d 1203 (Ohio 1983); Oklahoma, *see, e.g.*, *Higgins v. Ridenhour*, No. 50-819, 1978 Okla. Civ. App. LEXIS 112 (Ct. App. Feb. 28, 1978); South Dakota, *see, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Ragatz*, 571 N.W.2d 155 (S.D. 1997); Texas, *see, e.g.*, *Coronado v. Employers' Nat'l. Ins. Co.*, 596 S.W.2d 502 (Tex. 1979); Washington, *see, e.g.*, *Eshelman v. Grange Ins. Ass'n*, 442 P.2d 964 (Wash. 1968); Wisconsin, *see, e.g.*, *Employers Ins. Co. v. Pelczynski*, 451 N.W.2d 300 (Wis. Ct. App. 1989).

(3) The strict or "conversion" rule provides that any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause. States adhering to this view include Maine, *see, e.g.*, *Johnson v. American Auto. Ins. Co.*, 161 A. 496 (Me. 1932); Michigan, *see, e.g.*, *Gray v. Sawatzki*, 289 N.W. 227 (Mich. 1939).

(4) The broad statutory approach allows courts to liberally construe the omnibus clause to provide coverage. One state that follows this approach is Alaska. *See, e.g.*, *Johnson v. USF&G*, 601 P.2d 260 (Alaska 1979).

(5) The presumption of permission provides that permission will be presumed. However, the party asserting that permission did not exist may rebut the presumption. States that adhere to this view include Hawaii and Vermont. *See, e.g.*, *ALG Hawai'i Ins. Co. v. Vincente*, 891 P.2d 1041 (Haw. 1995); *American Fidelity Co. v. North British & Mercantile Ins. Co.*, 204 A.2d 110 (Vt. 1964). *But see* *Columbia Cas. Co. v. Hoohuli*, 437 P.2d 99 (Haw. 1968) (applying initial permission rule).

age, may be expressed or implied. The doctrine of implied permission extends the insurer's liability so that it is coextensive with the named insured's liability to injured third parties under tort doctrines, such as dangerous instrumentalities and vicarious or imputed negligence. Thus, the omnibus clause merely affords coverage to the injured party and the driver of the insured vehicle; it does not expand the coverage provided in the policy or alter the theories upon which the insurer is liable.²³ In other words, the extended coverage provided by the omnibus clause is subject to the same conditions, limitations, and exceptions that are applicable to the named insured.²⁴

Two circumstances must exist in order for extended coverage to ensue. First, the vehicle's use must be with the permission of the named insured, and second, liability for damages must arise out of the vehicle's ownership, maintenance, or use. The first requirement for extended omnibus coverage — that "use must be with the permission of the named insured" — consists of two legally significant sub-components. Those sub-components are (a) permission; (b) from the named insured. Both must be present in order to satisfy the first requirement. Permission from an owner of an insured motor vehicle will not suffice for purposes of omnibus coverage if someone other than the owner is designated the named insured in the insurance policy.²⁵ In essence, "[p]ermission, whether expressly or impliedly conferred, must originate in the language or the conduct of the named insured or of some other person having authority to bind the named insured in that respect."²⁶

(6) Also, a contract-by-contract basis exists. Some states recognize that the terminology employed in omnibus clauses vary to such a degree that extended coverage should be determined on a policy by policy basis. Maryland adheres to this view. *See, e.g., National Grange Mut. Ins. Co. v. Pinkley*, 399 A.2d 877 (Md. 1979).

Litigation involving disputes over whether omnibus coverage extends to permitted users can be divided into two classes: (1) those involving claims resulting from accidents in which the driver of the insured vehicle was given permission by the named insured; and (2) those involving claims resulting from accidents in which the driver of the insured vehicle was given permission to drive the vehicle by the original permittee. The driver of the vehicle in the latter class of claims is referred to as a permittee's permittee. For a detailed discussion of the analysis used to determine coverage in subsequent permittee cases, see Jay M. Zitter, Annotation, *Omnibus Clause as Extending Automobile Liability Coverage to Third Person Using Car with Consent of Permittee of Named Insured*, 21 A.L.R.4th 1146 (1983).

23. See 8 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* 3D, chap. 111, § 111:19, at 111-32 (1997).

24. See *id.* § 111:20, at 111-34.

25. See, e.g., *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Mattison*, 243 So. 2d 490 (Ala. 1971).

26. 8 RUSS & SEGALLA, *supra* note 23, chap. 112, § 112:22, at 111-39; see *id.* at §§ 112:25-112:28.

The circumstances triggering omnibus coverage demonstrate that whether a "use" comes within the scope of the permission granted to use the insured vehicle is distinct from whether a "use" comes within the coverage of the policy. Courts, in ascertaining whether the use comes within the scope of the permission granted, typically apply one of six widely accepted theories.²⁷ For purposes of the latter issue, the word "use" has generally been accorded its ordinary meaning, and therefore it "is not confined to motion on the highway, but extends to any activity involved in the utilization of the covered vehicle in the manner intended or contemplated by the insured."²⁸ Nevertheless, judicial interpretation of the term "use" as a condition precedent for omnibus coverage has not been uniform. A substantial number of jurisdictions adhere to the view that "use" is not synonymous with "operations" but rather embraces it.²⁹ According to this view, as long as the use is permitted it is immaterial how or by whom the vehicle was being operated at the time of the accident.³⁰ However, where the omnibus clause contains the phrase "actual operation," how and by whom the vehicle was being operated at the time of the accident is material.³¹

Many modern standardized automobile liability omnibus clauses have substituted the phrase "actual use" for the word "use." Some authorities take the position that the word "actual" does not add to or subtract from the general meaning of "use."³² Other jurisdictions

27. See *supra* note 22.

28. See 8 RUSS & SEGALLA, *supra* note 23, at chap. 111, § 111.35, at 111-61 to 111-62.

29. See *Continental Ins. Co. v. USF&G*, 528 P.2d 430 (Alaska 1974); *Travelers Ins. Co. v. Northwestern Mut. Ins. Co.*, 104 Cal. Rptr. 283 (Cal. Ct. App. 1972); *Freeman v. Nationwide Mut. Ins. Co.*, 166 A.2d 455 (Conn. 1960); *Allstate Ins. Co. v. Nationwide Mut. Ins. Co.*, 273 A.2d 261 (Del. 1970); *American Fire & Cas. Co. v. Blanton*, 182 So. 2d 36 (Fla. Dist. Ct. App. 1966); *Visintin v. Country Mut. Ins. Co.*, 222 N.E.2d 550 (Ill. App. Ct. 1966); *Grinnel Mut. Reinsurance Co. v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 176 (Iowa 1997); *Smith v. Insurance Co.*, 161 So. 2d 903 (La. Ct. App. 1964); *Taylor v. USF&G*, 519 A.2d 182 (Me. 1986); *Cohen v. American Home Assurance Co.*, 258 A.2d 225 (Md. 1969); *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 384 N.W.2d 877 (Minn. 1986); *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623 (Mo. 1979); *Indemnity Ins. Co. of N. Am. v. Metropolitan Cas. Ins. Co.*, 166 A.2d 355 (N.J. 1960); *United Servs. Auto. Ass'n v. National Farmers Union Property & Cas.*, 891 P.2d 538 (N.M. 1995); *State Auto. Mut. Ins. Co. v. W. Am. Ins. Co.*, 1994 Ohio App. Lexis 883; *Oregon Mut. Ins. Co. v. Hollopeter*, 447 P.2d 391 (Or. 1968); *Helwig v. Esterly*, 208 A.2d 10 (Pa. Super. Ct. 1965); *Mullins v. Federal Dairy Co.*, 568 A.2d 759 (R.I. 1990); *Safeco Ins. Co. of Am. v. Pacific Indem. Co.*, 401 P.2d 205 (Wash. 1965); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 175 S.E.2d 478 (W. Va. 1970); *Prisuda v. General Cas. Co. of Am.*, 74 N.W.2d 777 (Wis. 1956).

30. See *supra* note 29.

31. See *Selected Risk Ins. Co. v. Travelers Ins. Co.*, 287 A.2d 675 (Del. Super. Ct. 1972). But see *Hemphill v. Home Ins. Co.*, 174 S.E.2d 251 (Ga. Ct. App. 1970).

32. See, e.g., *Nationwide Mut. Ins. Co. v. Neat*, 1970 Del. Super. LEXIS 466 (Del. Super. Ct. March 20, 1970); *Strickland v. Georgia Cas. & Sur. Co.*, 162 S.E.2d 421

have accorded the phrase legal significance. In the latter jurisdictions the phrase "actual use" means the particular use at the time of the accident must be in accordance with the stated or intended use at the time, place or purpose authorized by the insured.³³ Thus, manner and scope of the use at the time of the accident are important considerations.³⁴

As observed earlier, the omnibus clause merely affords coverage to the injured party and driver of the insured vehicle on the same terms and subject to the same conditions, limitations, and exceptions applicable to the named insured. Exclusions of certain drivers or persons in automobile liability policies are permitted; however, exclusions which dilute, condition, or otherwise conflict with statutory provisions mandating the inclusion of an omnibus clause are construed as void and unenforceable.³⁵ For example, in *Williams v. Forbes*,³⁶ the court was asked to determine whether an exclusion illegally restricted coverage for permissive users as required by the omnibus statute of Louisiana. Ronald Williams was the owner of a 1983 Oldsmobile Firenza insured by Automotive Casualty Insurance Company. On June 6, 1992, Williams' car was involved in an accident while being driven by Ronald Forbes. At the time of the accident, Williams was a passenger in the car. Both Williams and Forbes were intoxicated.³⁷ Forbes was also driving the car without a driver's license.³⁸ The insurer denied

(Ga. 1968); *Fireman's Fund Indem. Co. v. Freeport Ins. Co.*, 173 N.E.2d 543 (Ill. App. Ct. 1961); *Sun Underwriters Ins. Co. v. Standard Accident Ins. Co.*, 47 So. 2d 133 (La. Ct. App. 1950); *Fisher v. USF&G*, 586 A.2d 783 (Md. Ct. Spec. App. 1991); *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969); *Metcalf v. Hartford Accident & Indem. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964); *Gronquist v. Transit Cas. Co.*, 252 A.2d 232 (N.J. Super. Ct. Law Div. 1969); *Foley v. Tennessee Odin Ins. Co.*, 245 S.W.2d 202 (Tenn. 1951); *Thompson v. Ezzell*, 379 P.2d 983 (Wash. 1963).

33. See, e.g., *Employers Mut. Cas. Co. v. Poe*, 191 So. 2d 541 (Miss. 1966); *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623 (Mo. 1979); *McCullum v. Continental Ins. Co.*, No. L-92-141, 1993 WL 382455 (Ohio Ct. App. Apr. 9, 1993); *Gulla v. Reynolds*, 81 N.E.2d 406 (Ohio Ct. App. 1948); *Ryan v. Western Pac. Ins. Co.*, 408 P.2d 84 (Or. 1965); *Maryland Cas. Co. v. State Farm Mut. Auto. Ins. Co.*, 441 S.E.2d 338 (S.C. Ct. App. 1994).

34. See *supra* note 33.

35. See, e.g., *Ogden v. USF&G*, 933 P.2d 1200 (Ariz. Ct. App. 1996); *Great Am. Ins. Co. v. Globe Indem. Co.*, 87 Cal. Rptr. 653 (Cal. Ct. App. 1970); *Farmers Ins. Exch. v. Dotson*, 913 P.2d 27 (Colo. 1996); *Williams v. Forbes*, 650 S.2d 337 (La. Ct. App. 1995); *Parkway Iron & Metal Co. v. New Jersey Mfg. Ins. Co.*, 629 A.2d 1352 (N.J. Super. Ct. App. Div. 1993); *Travelers Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 203 N.E.2d 846 (Ohio Ct. App. 1964); *Cimarron Ins. Co. v. Travelers Ins. Co.*, 355 P.2d 742 (Or. 1960); *American Mut. Fire Ins. Co. v. Southland Motors, Inc.*, 302 S.E.2d 854 (S.C. 1983); *Southside Distrib. Co. v. Travelers Indem. Co.*, 189 S.E.2d 681 (Va. 1972).

36. 650 So. 2d 337 (La. Ct. App. 1995).

37. See *id.* at 338.

38. See *id.*

coverage on the basis of a provision in the policy requiring that a "covered person have a valid driver's license."³⁹

The insurance policy in *Williams v. Forbes* provided:

A. INSURING AGREEMENT

We will pay damages for bodily injury or property damages for which any covered person with a valid driver's license becomes legally responsible because of an auto accident. . .

B. DEFINITIONS

1. "Covered person" as used in this section, is defined as a person having a valid driver's license and who is . . .

b. a person using your covered auto with your permission.⁴⁰

The insurer argued that the valid driver's license requirement was clearly stated in the policy and supported by LSA-R.S. 32:52 which provided:

No person shall drive or operate any vehicle upon any highway within this state unless and until he has been issued a license to do so as required by the laws of this state nor shall any person permit or allow any other person to drive or operate any vehicle owned or controlled by him upon highways of this state unless and until such other person has been issued a license to so do as required by the laws of this state.⁴¹

According to the insurer, LSA-R.S. 32:52 reflects a public policy which mandates that a person operating a motor vehicle must possess a valid driver's license. Consequently, the policy limitation furthered such public policy by requiring that a covered person have a driver's license.⁴² Despite statutory support for the insurer's position, the court in *Williams* observed that the statutory omnibus clause requirement was to be broadly construed even when there is a conflict with other policy terms or statutes.⁴³

The liberal interpretation accorded the omnibus clause in *Williams v. Forbes* is not unique to Louisiana. In other jurisdictions where omnibus clauses are statutorily mandated, courts rely upon the same broad public policy rationale in determining omnibus coverage.⁴⁴ According to this rationale, the legislature in enacting a mandatory omnibus clause law intended to protect the named insured, permissive driver, and public at large from any harm accidentally caused by a

39. *Id.*

40. *Id.* at 338-39.

41. *Id.* at 339.

42. *See id.*

43. *See id.*

44. *See, e.g.,* Principal Cas. Ins. Co. v. Progressive Cas. Ins. Co., 838 P.2d 1306 (Ariz. Ct. App. 1992); American Home Assurance Co. v. Hartford Ins. Co., 464 A.2d 1128 (N.J. Super. Ct. App. Div. 1983); Miller v. Lambert, 464 S.E.2d 582 (W. Va. 1995). *But see* United Serv. Auto. Ass'n v. Reilly, 858 P.2d 457 (Or. Ct. App. 1993)(holding that business exclusion does not violate mandatory omnibus clause where it limits coverage in excess of that required by statute).

motor vehicle.⁴⁵ Therefore, any attempt by an insurer to restrict, limit, or condition omnibus coverage is contrary to public policy.

In jurisdictions that lack mandatory omnibus clause statutes the issue of whether an exclusion from omnibus coverage is valid is ascertained quite differently. These jurisdictions use an ambiguity analysis⁴⁶ that accords the public policy inherent in all compulsory insurance laws some but not decisive weight. For example, in *Humble Oil & Refining Co. v. Lumbermens Mutual Casualty Co.*⁴⁷ a vehicle owned by McCord-Lane Company and insured by Lumbermens Mutual was involved in an accident while driven by Virgil Buckelew. Buckelew was an employee of Humble Oil & Refining Company. Buckelew acquired possession of the vehicle from McCord-Lane in the scope of his employment for purposes of servicing it. After the vehicle was serviced at the Humble Oil service station and while it was being returned to McCord-Lane it was involved in a collision with a motorcycle driven by Charles Clayton. Clayton subsequently filed suit against Humble Oil Company. Humble Oil gave notice of the lawsuit to Lumbermens Mutual and requested that Lumbermens defend it in the case. Lumbermens refused and disclaimed liability on the ground that Buckelew was not an insured under its policy.

The insurance policy in *Humble Oil* contained an automobile business exclusion which excluded from omnibus coverage: "(v) Any person while employed in or otherwise engaged in duties in connection with an automobile business, other than an automobile business operated by the named insured."⁴⁸ "Automobile business" was defined in the policy to mean "the business or occupation of selling, repairing, servicing, storing or parking automobiles."⁴⁹ The court in analyzing the exclusion noted that damage caused to privately owned vehicles by repairmen or their employees materially enhanced the risk assumed by insurance companies.⁵⁰ Therefore, insurers had a legitimate interest, and the exclusion served a valid purpose. In light of the fact that Texas law only mandated an omnibus clause in a liability policy certified as proof of financial responsibility, the court took the position that the exclusion was valid if its language was clear and unambiguous.⁵¹

45. See *supra* note 18.

46. See *infra* Part IV.A.

47. 490 S.W.2d 640 (Tex. Civ. App. 1973).

48. *Id.* at 641.

49. *Id.*

50. See *id.* at 642.

51. See *id.* at 644; see generally *United Servs. Auto. Ass'n v. Lail*, 385 S.E.2d 424 (Ga. Ct. App. 1989); *Northern Assurance Co. of Am. v. Truck Ins. Exch.*, 439 P.2d 760 (Mont. 1968); *Providence Wash. Ins. Co. v. Glens Falls Ins. Co.*, 276 A.2d 386 (N.J. Super. Ct. Ch. Div. 1971); *Universal Underwriters Ins. Co. v. Farmers Ins. Exch.*, 308 N.E.2d 288 (Ill. App. Ct. 1974).

III. AUTO LIABILITY COVERAGE: INTENTIONAL INJURY EXCLUSION

Expressed restrictions on the risks being transferred are universal features of insurance contracts. These restrictions can be set forth in the basic coverage provision or in other sections of the policy designed specifically for that purpose.⁵² In the context of automobile liability insurance, the insuring agreement, which sets forth the basic statement or description of coverage, also contains several limitations that can serve as the basis for the denial of a claim. For example, the model insuring agreement established above expressly limits coverage to bodily injury and property damage for which any insured becomes legally responsible because of an "auto accident." Another common feature of the standardized automobile liability insuring agreement, not found in the model agreement set forth above, is the further restriction that the auto accident "result from the use, maintenance, or ownership of the vehicle." Most automobile liability coverage provisions are followed by clauses that expressly exclude coverage for bodily injury or property damage caused intentionally by or at the direction of the insured.

Clauses excluding intentionally caused damage or injury need not be expressly set out in the policy.⁵³ Rather, public policy precludes an individual from insuring against the economic consequences of his intentional wrongdoing.⁵⁴ Were the rule otherwise, the deterrence effect of financial accountability for wrongdoing would be lacking. The rationale for the prohibition is to prevent moral hazard by not granting the insured a license to intentionally injure others with impunity and still reap the benefit of insurance coverage. This rationale also provides substantial support for the rule that insurance may not be obtained to indemnify the insured against the consequences of his criminal conduct.⁵⁵

52. See *supra* note 3.

53. The advantages of an expressed exclusion for intentionally caused damage or injury are (1) it provides the insured and courts with a more precise articulation of the restriction; (2) it can be drafted to impose a more extensive limitation or restriction than the court would recognize in the absence of an explicit policy provision. See KEETON & WIDISS, *supra* note 1, § 5.4(d), at 518-19.

54. Legislative expression of this public policy can be found in the statutes of a number of states. The statute provides:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

CAL. CIV. CODE § 1668 (West 1985); see MONT. CODE ANN. § 28-2-702 (1999); OKLA. STAT. ANN. tit. 15, § 212 (West 1993); S.D. CODIFIED LAWS § 53-9-3 (Michie 1990).

55. See KEETON & WIDISS, *supra* note 1, § 5.4(d), at 519.

The coverage language of the insuring agreement, in the absence of an expressed exclusion, serves as the basis for the implied exclusion for intentionally caused injury. In essence, if the injury was not the result of an "occurrence"⁵⁶ or "accident"⁵⁷ — as the term(s) is set out in the insuring agreement — then public policy precludes payment of the proceeds because it was intended. "Accident" is generally defined, in the absence of a definition in the policy, as an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character and often accompanied by a manifestation of force.⁵⁸ By virtue of this widely accepted definition, what constitutes an accident depends on the perspective of either the injured victim or the insured. A majority of the jurisdictions that have addressed the issue of whose perspective should be decisive in determining whether an accident has occurred have, in the absence of a provision in the policy, adopted the position of the injured victim.⁵⁹ When the perspective of the injured victim is

56. A number of policies use the term "occurrence" rather than "accident" in the insuring agreement. Policies that have adopted the term "occurrence" uniformly define that term in the definition section of the policy to mean an "accident." Consequently, the observations set out above apply regardless of the terminology that is employed.

57. The typical motor vehicle liability coverage insuring agreement places two restrictions or limitations on coverage: (1) the legal liability of the insured for injury or damage resulting from an accident; (2) which arises out of the use, maintenance, or ownership of the insured vehicle. The second restriction is beyond the scope of the primary thesis and will not be discussed in any detail in the text. However, the majority of courts agree that in order for the accident to arise out of the "use" of the vehicle there must be a causal relationship between the use of the vehicle and the injury. The causal connection must be more than incidental, fortuitous, or but for. Furthermore, it is not enough that the vehicle is merely the situs of the injury. See, e.g., *Vanguard Ins. Co. v. Cantrell*, 503 P.2d 962 (Ariz. Ct. App. 1972); *Garrison v. State Farm Mut. Ins. Co.*, 907 P.2d 891 (Kan. 1995); *Casso v. United Cabs, Inc.*, 688 So. 2d 180 (La. Ct. App. 1997); *Detroit Auto. Inter-Ins. Exch. v. Higginbotham*, 290 N.W.2d 414 (Mich. Ct. App. 1980); *Transamerica Ins. Group v. Union Pac. Ins. Co.*, 593 P.2d 156 (Wash. 1979).

58. See *Century Mut. Ins. Co. v. Southern Ariz. Aviation, Inc.*, 446 P.2d 490, 492 (Ariz. Ct. App. 1968); *Prasad v. Allstate Ins. Co.*, 644 So. 2d 992, 996 (Fla. 1994) (McDonald, J., dissenting); *Crawford Lab., Inc. v. St. Paul Ins. Co.*, 715 N.E.2d 653, 658 (Ill. App. Ct. 1999); *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 70 (Iowa 1999); *State Farm Fire & Cas. Co. v. Falley*, 926 P.2d 664, 666 (Kan. Ct. App. 1996); *Primm v. State Farm Fire & Cas. Co.*, 426 So. 2d 356, 359-60 (La. Ct. App. 1983); *American States Ins. Co. v. Mathis*, 974 S.W.2d 647, 650 (Mo. Ct. App. 1998); *Casper v. American Guar. & Liab. Ins. Co.*, 184 A.2d 247, 249 (Pa. 1962); *Stoebner v. South Dakota Farm Bureau Mut. Ins. Co.*, 598 N.W.2d 557, 558 (S.D. 1999); *Harris v. Bankers Life & Cas. Co.*, 278 S.E.2d 809, 810 (Va. 1981).

59. See *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1169 (Del. 1990); *Prasad v. Allstate Ins. Co.*, 644 So. 2d 992, 996 (Fla. 1994) (McDonald, J., dissenting); *Cotton States Mut. Ins. Co. v. Neese*, 329 S.E.2d 136, 141 (Ga. 1985); *Redden v. Doe*, 357 So. 2d 632, 634 (La. Ct. App. 1978); *Dias v. Cinquegrana*, 727 A.2d 198, 200 (R.I. 1999); *Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.*, 290 N.W.2d 285, 288-89 (Wis. 1980). But see *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499 (Wash.

used, any injury not attributable to the victim is of accidental cause. This view affords the broadest possible coverage. The mere inclusion of an expressed intentional injury exclusion in a contract of insurance does not alter the result that follows application of the victim's perspective. Consequently, many insurers sought to clarify and replace the intentional injury exclusion by drafting liability coverage insuring agreements to provide:

We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by accident and resulting from the ownership, maintenance or use of a covered vehicle.

DEFINITION

Accident includes continuous or repeated exposure to the same conditions resulting in bodily injury or property damage the insured neither expected or intended.⁶⁰

Provisions of this nature limit the term "accident" for coverage purposes to those actions of the insured that were neither expected nor intended.⁶¹ This language also focuses the evaluation of whether the injury-causing event was an accident on the perspective of the insured.⁶²

The perspective of the insured approach provides coverage in a much narrower range of circumstances than the perspective of the injured victim approach. The perspective of the insured approach relieves the liability insurer of its obligations under the policy if the insured acted with specific intent to cause the injury in question.⁶³

1992). See generally *Farm & City Ins. Co. v. Potter*, 330 N.W.2d 263, 265 (Iowa 1983).

60. It is generally agreed that provisions containing language of this nature are the equivalent of intentional tort exclusions. See *Continental Ins. Co. v. McDaniel*, 772 P.2d 6, 7-8 (Ariz. Ct. App. 1988); *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689, 690 (Ark. 1984); *McCullough v. Central Fla. YMCA*, 523 So. 2d 1208, 1208-09 (Fla. Dist. Ct. App. 1988); *Roe v. State Farm Fire & Cas. Co.*, 376 S.E.2d 876, 876 (Ga. 1989); *Auto-Owners Ins. Co. v. Gardipey*, 434 N.W.2d 220, 222 (Mich. Ct. App. 1988); *Horace Mann Ins. Co. v. Independent Sch. Dist. No. 656*, 355 N.W.2d 413, 418 (Minn. 1984); *State Farm Fire & Cas. Co. v. Reuter*, 657 P.2d 1231, 1232 (Or. 1983); see generally *Harpy v. Nationwide Mut. Fire Ins. Co.*, 545 A.2d 718 (Md. Ct. Spec. App. 1988); *County of Chemung v. Hartford Cas. Ins. Co.*, 496 N.Y.S.2d 933 (Sup. Ct. 1985).

61. See James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R.4th 957, 972 (1984).

62. See *id.*

63. See, e.g., *Vanguard Ins. Co. v. Cantrell*, 503 P.2d 962 (Ariz. Ct. App. 1972); *Smith v. Moran*, 209 N.E.2d 18 (Ill. App. Ct. 1965); *Casso v. United Cabs, Inc.*, 688 So. 2d 180 (La. Ct. App. 1997); *Putman v. Zeluff*, 127 N.W.2d 374 (Mich. 1964); *Subscribers at the Auto. Club Inter-Ins. Exch. v. Kennison*, 549 S.W.2d 587 (Mo. Ct. App. 1977); *Baldinger v. Consolidated Mut. Ins. Co.*, 183 N.E.2d 908 (N.Y. 1962); *Lumbermens Mut. Ins. Co. v. Blackburn*, 477 P.2d 62 (Okla. 1970); *City of Burns v. Northwestern Mut. Ins. Co.*, 434 P.2d 465 (Or. 1967); *Alm v. Hartford Fire Ins. Co.*, 369 P.2d 216 (Wyo. 1962).

Under this approach, it is not sufficient that the insured's intentional act resulted in unintentional harm to a third party. Rather, the consequences of the intended act must have been intended before the exclusion is effective.⁶⁴ Another dimension of the perspective of the insured approach used by some courts in assessing whether an accident has occurred is to infer intent to cause harm where the injury is the natural and probable consequence of the insured's intentional act.⁶⁵ "This approach focuses on what a reasonable person would view as the probable consequences of an act, rather than on a tortfeasor's subjective state of mind."⁶⁶

Assessing whether an accident has occurred from either dimension of the perspective of the insured is difficult to comprehend in the abstract. Consequently, *Subscribers at the Automobile Club Inter-Insurance Exchange v. Kennison*⁶⁷ provides a well-reasoned model of practical application from which to view the principles of both dimensions in operation. In *Kennison*, Brown, an insured under an automobile insurance policy issued by Auto Club, was involved in a collision with a car being driven by Kennison. At the time of the accident, Kennison's car, with Kennison at the wheel, blocked Brown's car in the traffic lane of a parking lot. Brown sounded his horn and twice orally requested Kennison to move his car. After the second request Kennison said, "[y]ou make me move."⁶⁸ Brown then backed his car up a few feet and "intentionally drove forward and 'rammed' into the left rear of the Kennison car."⁶⁹

Following the accident, Auto Club filed an action for a declaratory judgment requesting that the court find that it was not obligated to provide coverage because the injury was not the result of an accident but had been caused deliberately. Auto Club further argued that the intentional injury exclusion contained in the policy was controlling

64. See W. E. Merritt III, Annotation, *Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured*, 2 A.L.R.3d 1238, § 2, at 1240-41 (1965); see generally KEETON & WIDISS, *supra* note 1, § 5.4(d)(2), at 520.

65. See, e.g., *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157 (Ill. App. Ct. 1980); *State Farm Fire & Cas. Co. v. Falley*, 926 P.2d 664 (Kan. Ct. App. 1996); *Subscribers at the Auto. Club Inter-Ins. Exch. v. Kennison*, 549 S.W.2d 587 (Mo. Ct. App. 1977); *Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800 (N.H. 1986); *State Farm Mut. Auto. Ins. Co. v. Wertz*, 540 N.W.2d 636 (S.D. 1994).

66. KEETON & WIDISS, *supra* note 1, § 5.4(d)(2), at 521-22. Courts have developed other approaches for determining whether an injury constitutes an accident. For example, courts sometimes interpret the term "expected" in the phrase "neither expected nor intended from the standpoint of the insured" to mean that if the injury is substantially certain to be a consequence of the insured's action then coverage is precluded. *Id.* at 523. The term "expected" is construed and defined in such a way as to make it clear that "knowledgeable intent," as well as, "purposeful intent" is sufficient to preclude coverage. *Id.*

67. 549 S.W.2d 587 (Mo. Ct. App. 1977).

68. *Id.* at 589.

69. *Id.*

and consequently justified its decision to deny coverage. The trial court found that Brown's actions were wanton and reckless, but not intentional. Auto Club, aggrieved by the trial court's decision, appealed.

The appellate court in *Kennison* observed that whether injury is caused intentionally within the meaning of an automobile liability insurance exclusion clause could be determined from either of two dimensions. The first dimension, according to this court, requires an evaluation of the facts, keeping in mind any evidence suggesting that the insured acted with specific intent to cause injury. In the event that credible evidence of specific intent to cause intentional injury was absent, then the second dimension would become applicable. The second dimension, the probable and natural consequence test, does not totally depend upon the evidence. Rather, the court may rely upon its own experience to determine whether the injuries were intended. Where the injuries are the natural and probable consequences of the insured's act, the injuries as well as the act are presumed to be intentional.⁷⁰ Relying on the fact that Brown admitted the collision was intentional and because the injuries were the natural and probable consequences of Brown's act, the appellate court concluded that the injuries were intentional under both dimensions of the perspective of the insured approach.

Courts, without regard to perspective, universally agree that the public policy concerns inherent in the intentional injury exclusion do not arise when the insured is being sued derivatively for the negligent or intentional conduct of another.⁷¹ Consequently, where an insured is sued for the intentional conduct of an agent or employee, the exclusion is inapplicable. However, pursuant to the perspective of the insured approach, if the insured directed or authorized the intentional conduct, the exclusion is triggered and the insurer is relieved of its obligation under the policy.⁷²

Liability insurance, in general, was initially designed to protect the insured against economic losses arising out of his legal liability for any fortuitous or accidental act. This observation was true in the case of automobile liability insurance, and it continues to be so. However, because all states have enacted some form of compulsory motor vehicle insurance laws, courts have been forced to incorporate the interests of

70. See *id.* at 591.

71. "In general insurance to indemnify insured against his own violation of law is void as against public policy; but insurance to indemnify him against the consequences of a violation of law by others, or against his own negligence, or the negligence of others, is valid." *Haser v. Maryland Cas. Co.*, 53 N.W.2d 508, 512 (N.D. 1952) (quoting 44 C.J.S. *Insurance* § 242b(1945); see KEETON & WIDISS, *supra* note 1, § 5.4(d)(5), at 527-529; Merritt III, *supra* note 64, § 5, at 1246.

72. See *Edwards v. Akion*, 279 S.E.2d 894 (N.C. Ct. App. 1981); *Haser*, 53 N.W.2d at 512.

injured parties into the traditional view of liability insurance. Courts evaluating the intentional injury exclusion from a statutory perspective are in essence attempting to ascertain whether the legislature intended to abolish the exclusion when it enacted the pertinent statute. Legislative history is especially useful in determining legislative intent; however, state session laws rarely contain the detailed debates or legislative history generally reflected in their federal counterparts. Consequently, courts applying the statutory analysis rely principally on their own perceptions of the purpose and objective of the legislation. A number of considerations influence these perceptions, including (1) the existence of related legislation in which the exclusion was or was not expressly abolished;⁷³ (2) the societal benefit provided by statute; (3) the interests protected by exclusion; and (4) whether the benefits provided and interests protected are at odds with each other in light of the mandatory nature of the insurance.

Compulsory insurance laws, especially motor vehicle financial responsibility statutes, have profoundly altered how courts view the in-

73. A substantial number of state legislatures have, as a part of their compulsory motor vehicle statutes, enacted No-Fault Insurance Statutes which provide for personal injury protection (PIP). These statutes basically state that the benefits with respect to personal injury protection shall be provided without regard to, and irrespective of, negligence, freedom from negligence, fault, or freedom from fault on the part of any person. No-Fault Acts may be read as requiring coverage for liability arising from intentional injury. See, e.g., *Allstate Ins. Co. v. Malec*, 514 A.2d 832 (N.J. 1986)(rejecting the reading of No-Fault Act *in pari materia* with the compulsory liability insurance law and holding that No-Fault Act cannot be read as support for the conclusion that intentional injury exclusion was void in the context of the mandatory automobile liability coverage).

States which have enacted No-Fault laws include: Arkansas, see ARK. CODE ANN. § 23-89-202 (Michie 1992); Colorado, see COLO. REV. STAT. § 10-4-706 (1999); District of Columbia, see D.C. CODE ANN. § 35-2104 (1981); Florida, see FLA. STAT. ANN. § 627.736 (West 2000)(insurer can exclude coverage to any person whose injury was caused by their own intentional act); Hawaii, see HAW. REV. STAT. § 431:10C-103.5 (Supp. 1998); Kansas, see KAN. STAT. ANN. § 40-3107 (1992)(insurer can exclude coverage for any damages arising out of intentional act); Kentucky, see KY. REV. STAT. ANN. § 304.39-040 (Banks-Baldwin 1995); Maryland, see MD. CODE ANN., INS. § 19-505 (1997); Massachusetts, see MASS. GEN. LAWS ANN. ch. 90, § 34(M) (West 1999); Michigan, see MICH. COMP. LAWS ANN. § 500.3105 (1993)(insurer can exclude coverage for intentional act); New Jersey, see N.J. STAT. ANN. §§ 39:6A-3.1, 39:6A-7 (West 1999)(insurer may exclude a person from benefits where such person contributed to injury intentionally or in the commission of a misdemeanor, felony or seeking to avoid arrest); New York, see N.Y. INS. LAW § 5101, 5103 (McKinney 1999)(insurer may exclude coverage to person who intentionally causes own injury; injured as a result of operating vehicle while intoxicated, under influence of drugs, committing felony, etc.); Oregon, see OR. REV. STAT. § 742.520 (1997); Texas, see TEX. INS. CODE ANN. § 5.06-3 (West 2000); Utah, see UTAH CODE ANN. §§ 31A-22-302, -309 (1999) (insurer may exclude a person from benefits where such person contributed to injury intentionally or in the commission of a misdemeanor, felony or seeking to avoid arrest); Washington, see WASH. REV. CODE ANN. § 48.22.085 (West 1999).

tentional injury exclusion. For example, in *Nationwide Mutual Insurance Co. v. Roberts*,⁷⁴ a violent altercation between Mac Roberts and Johnny Scippio occurred at the home of a mutual friend. Scippio left the residence, and Roberts attempted to overtake him on foot. When this proved unsuccessful, Roberts began a search for Scippio in his car that was insured by Nationwide Mutual. When Roberts sighted Scippio walking along a sidewalk, he deliberately drove his car across the sidewalk and crushed Scippio. Scippio subsequently sued Roberts and demanded that Nationwide indemnify its insured — Roberts. Nationwide refused on the grounds that Roberts' conduct was not an accident within the meaning of the liability insurance policy. Nationwide further argued that Roberts' conduct violated the expressed intentional injury exclusion of the policy.

The court in *Nationwide* began its analysis by ascertaining whether the liability policy in issue was a voluntary policy or one mandated by the Motor Vehicle Safety and Responsibility Act. Concluding that the policy was one issued under the mandatory Safety Responsibility Law the court observed:

The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by the negligence of financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. In order to accomplish the objective of the law, the perspective here must be that of the victim and not that of the aggressor for whom the law provides criminal penalties calculated to minimize any profit he might derive from the insurance. The victim's rights against the insurer are not derived through the insured as in the case of voluntary insurance. They are statutory and become absolute on the occurrence of an injury covered by the policy.⁷⁵

This rationale has been variously stated and relied upon to void intentional injury exclusions.⁷⁶ However, the statutory analysis of the intentional injury exclusion is very limited in nature. The first limitation is that the analysis is applicable only to compulsory motor

74. 134 S.E.2d 654 (N.C. 1964).

75. *Id.* at 659.

76. The majority of jurisdictions that have addressed the issue have held that financial responsibility laws that mandate liability coverage for "accidents" mandate coverage for both intentional and unintentional torts. *See, e.g.,* *State Farm Fire & Cas. Co. v. Tringali*, 686 F.2d 821 (9th Cir. 1982); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168 (Del. 1990); *Martin v. Chicago Ins. Co.*, 361 S.E.2d 835 (Ga. Ct. App. 1987); *Mosley v. West Am. Ins. Co.*, 743 S.W.2d 854 (Ky. Ct. App. 1987); *Wheeler v. O'Connell*, 9 N.E.2d 544 (Mass. 1937); *Cannon v. Commerce Ins. Co.*, 470 N.E.2d 805 (Mass. App. Ct. 1984); *Hartford Accident & Indem. Co. v. Wolbarst*, 57 A.2d 151 (N.H. 1948); *Nationwide Mut. Ins. Co. v. Knight*, 237 S.E.2d 341 (N.C. Ct. App. 1977); *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11 (S.C. Ct. App. 1989); *Dotts v. Taressa J.A.*, 390 S.E.2d 568 (W. Va. 1990).

vehicle liability insurance.⁷⁷ Second, some courts void the exclusion only to the extent of the minimum amount of coverage required by the statute.⁷⁸ In such a jurisdiction, the intentional injury exclusion is not automatically void as to coverage in excess of that required by law.⁷⁹ Rather, the effect of the exclusion on coverage in excess of that required by law is determined on the basis of either the perspective of the victim or insured approach.

The statutory analysis that disfavors the intentional injury exclusion in the context of mandatory automobile liability insurance has been extended to prohibitive use provisions that negate liability coverage in car rental agreements.⁸⁰ The effect of this analysis has also been to void prohibitive use or exculpatory provisions in car rental agreements that nullify liability coverage.⁸¹ The statutory analysis in this area has thus come full circle. Courts no longer focus solely on the mandatory nature of the pertinent automobile liability insurance statute, but they also buttress the analysis with judicial condemnation of the insurance industry's practice of using private contracts to set public penalties — a purely governmental responsibility. As the court in *Bass v. Horizon Assurance Co.*⁸² put it:

The fixing of penalties for antisocial conduct is, in the first instance, a governmental responsibility through legislative response. The Delaware General Assembly has expressly determined the consequences which result from a conviction of driving while under the influence. These sanctions include the criminal penalties of fine and/or imprisonment, and license revocation through administrative action. We do not believe that the General Assembly, in addition to the imposition of these substantial penalties, also intended, by implication, to work a forfeiture of insurance protection purchased in conformity with State law.⁸³

Courts rejecting the statutory analysis have also done so on public policy grounds.⁸⁴ For example, in *Williams v. Diggs*⁸⁵ the court was

77. See *supra* note 76.

78. See, e.g., *Nationwide Mut. Ins. Co. v. Roberts*, 134 S.E.2d 654 (N.C. 1964); *Dotts v. Taressa J.A.*, 390 S.E.2d 568 (W. Va. 1990).

79. See *supra* note 76.

80. See, e.g., *Universal Indem. Ins. Co. v. Tenery*, 39 P.2d 776 (Colo. 1934); *Bass v. Horizon Assurance Co.*, 562 A.2d 1194 (Del. 1989); *Budget Rent-A-Car Sys., Inc. v. Ricardo*, 942 P.2d 507 (Haw. 1997); *Hertz Corp. v. Garrott*, 606 N.E.2d 219 (Ill. App. Ct. 1992); *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21 (Mo. Ct. App. 1982); *Donegal Mut. Ins. Co. v. Long*, 564 A.2d 937 (Pa. Super. Ct. 1989); *Ryan v. Knoller*, 695 A.2d 990 (R.I. 1997); *City of Norfolk v. Ingram*, 367 S.E.2d 725 (Va. 1988). But see *Sutherland v. NN Investors Life Ins. Co.*, 897 F.2d 593 (1st Cir. 1990)(not void); *Philadelphia Indem. Ins. Co. v. Carco Rentals, Inc.*, 923 F. Supp. 1143 (W.D. Ark. 1996)(not void); *Public Employees Mut. Ins. Co. v. Hertz Corp.*, 800 P.2d 831 (Wash. Ct. App. 1990)(not void as against public policy).

81. See cases cited *supra* note 80.

82. 562 A.2d 1194 (Del. 1989).

83. *Id.* at 1197 (citations omitted).

84. See, e.g., *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985); *Williams v. Diggs*, 593 So. 2d 385 (La. Ct. App. 1991); *Allstate Ins. Co. v. Malec*, 514

confronted with a factual situation strikingly similar to *Nationwide*, above. The plaintiff Eldridge Williams, defendant Lionel Diggs, and others were playing cards at the home of a mutual friend. During the game a quarrel erupted between Williams and Diggs. A third person intervened and broke up the altercation. Thereafter, Diggs told Williams to wait until he returned.⁸⁶ Diggs left the residence in his car. Williams also left and began walking to his home located in a nearby trailer park. As he was walking down a gravel lane inside the trailer park, Williams heard a car approaching from behind. He turned, saw Diggs' car, and continued walking, moving a little further over onto the grass beside the lane. When Williams heard the car accelerate, he turned around and saw the car coming straight at him. As he was struck by the car and bounced against the windshield, Williams observed that Diggs was driving the car. Diggs' car was insured with Champion Insurance Company at the time of the incidence.

Williams subsequently filed suit against Diggs and his insurer. The trial court rendered judgment against Diggs in the amount of \$17,703.85 plus costs and legal interest. The court also rendered judgment in favor of the Louisiana Insurance Guaranty Association (LIGA) which stood in the place of the insolvent Champion Insurance Company. Williams appealed this aspect of the trial court's opinion.

The appellate court in *Williams v. Diggs* decided that the dispositive issue was whether the Louisiana Compulsory Insurance Law required coverage in the minimum amount set forth in the statute, regardless of whether the injury was intentionally caused within the meaning of the expressed intentional injury exclusion in the automobile liability policy. The court, after having examined the merits of the case, observed:

It is true, as maintained by plaintiff, that the public policy of providing compensation to victims injured by motor vehicles is a strong one and has been applied by the courts of this state a number of times to strike down as invalid certain exclusionary clauses in automobile liability policies. However, . . . another well-established public policy must also be given consideration. This is the policy against allowing a person to insure himself against his own intentional acts causing injury to others. The rationale for this prohibition is to forbid the extension to the insured of a license to intentionally injure others with impunity and still fall under the coverage of his insurance policy . . . We do not believe the Legislature intended to mandate coverage for such injuries in view of the strong policy against allowing persons to insure themselves against liability for injuries they intentionally inflict.⁸⁷

A.2d 832 (N.J. 1986); *Snyder v. Nelson*, 564 P.2d 681 (Or. 1977); *State Farm Mut. Auto. Ins. Co. v. Wertz*, 540 N.W.2d 636 (S.D. 1995); *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 286 S.E.2d 225 (Va. 1982).

85. 593 So. 2d 385 (La. Ct. App. 1991).

86. *See id.* at 385.

87. *Id.* at 387 (citations omitted).

IV. RENTAL CAR: COLLISION DAMAGE WAIVER PROHIBITIVE USE EXCLUSIONS

Automobile rental and lease agreements uniformly provide lessees with a number of collision responsibility alternatives. Pursuant to these alternatives, lessee may elect to retain responsibility for collision damage up to optional limits expressly set out in the policy or waive collision damage coverage altogether.⁸⁸ The collision damage waiver, unlike the other alternatives, provides lessees with complete collision protection or the broadest collision protection afforded by the rental agreement. In exchange for this protection, however, car rental agreements conspicuously provide that the collision damage waiver is not insurance.⁸⁹ Despite the fact that collision damage waivers may not constitute insurance, courts have relied exclusively on insurance contract principles in construing these provisions. For example, in *Davis v. M.L.G. Corp.*⁹⁰ the court, adopting the reasonable expectation of the insured doctrine as articulated by Professor Keeton in *Insurance Law Rights at Variance with Policy Provisions*,⁹¹ explained:

This article concerns true insurance contracts rather than damage waiver provisions of the type at issue in this case. However, because the agreement in this case was, like most insurance contracts, a "form" contract prepared by the lessor and offered on a take-it-or-leave-it basis, "we feel that the appropriate interpretive principles are those normally applicable to insurance contracts."⁹²

88. The collision damage responsibility chosen by the lessee affects the rental rate of the leased vehicle. Car rental companies generally charge an additional daily fee in response to the collision responsibility option chosen by the lessee.

89. Courts generally agree that the act of renting a car creates a bailment between the leasing company (bailor) and the customer (bailee). At common law the bailee was responsible for any damage to the bailed property. Under this rule the customer was legally responsible for damage to the rented vehicle. However, parties to a bailment contract are free to alter the common law obligations as long as their agreement does not violate public policy. Consequently, exercise of the collision damage waiver option constitutes a change in the bailment agreement and places responsibility for damage to the vehicle on the leasing company. See 14 BLASHFIELD AUTOMOBILE LAW AND PRACTICE §§ 475.13 & 476.21 (Frederick D. Lewis ed., 3d ed. 1969).

The majority of courts which have addressed this issue agree that the collision damage waiver constitutes a change in the contract of bailment and not insurance. See *Chabreja v. Avis Rent A Car Sys., Inc.*, 549 N.E.2d 872 (Ill. App. Ct. 1989); *Hearty v. Harris*, 574 So. 2d 1234 (La. 1991); *Hertz Corp. v. Corcoran*, 520 N.Y.S.2d 700 (Sup. Ct. 1987). But see *Grand Rent A Car Corp. v. 20th Century Ins. Co.*, 31 Cal. Rptr. 2d 88 (Cal. Ct. App. 1994)(collision damage waiver is insurance); *Passamone v. Travelers Indem. Co.*, 882 P.2d 1312 (Colo. 1994)(collision damage waiver is insurance).

90. 712 P.2d 985 (Colo. 1986).

91. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions* 83 HARV. L. REV. 961 (1970).

92. *Davis v. M.L.G. Corp.*, 712 P.2d at 989 n.4 (citing *Elliott Leases Cars, Inc. v. Quigley*, 373 A.2d 810 (R.I. 1977)).

Car rental agreements also condition the protection afforded by the collision damage waiver upon the lessee's compliance with the use restrictions or prohibitive use provisions of the contract. Use restrictions may vary in terms of the number of prohibitions provided. However, restrictive uses common to car rental contracts include prohibitions against (1) intentionally, willfully or wantonly damaging vehicle; (2) using vehicle while intoxicated or under the influence of drugs or other substances which impair driving ability; (3) using vehicle in a speed contest or training activity; (4) using vehicle to commit a crime; (5) allowing vehicle to be operated by an unlicensed or unauthorized person; (6) using vehicle for hire. Collision coverage is limited in the agreement so as not to apply if there is a violation of any of the restrictions.

Despite maybe not being insurance,⁹³ the purpose of collision damage coverage in car rental agreements is the same as that in automobile collision coverage. Collision coverage is merely one form of automobile property insurance coverage.⁹⁴ Collision coverage differs sufficiently from automobile liability insurance in that neither the principles derived from nor the concerns underlying automobile liability insurance are applicable to coverage disputes under automobile property protection.⁹⁵ This is due, in large part, to the fact that "the strong public policy favoring liability insurance coverage to protect the public at large is generally absent from the analysis in the context of property coverages."⁹⁶ In other words, collision coverage disputes primarily involve issues and interests that, when compared to liability insurance disputes, are uniquely private in nature.

The model "Coverage For Damage To Your Auto" insuring agreement provides:

A. We will pay for direct and accidental loss to "your Covered auto" or any "non-owned auto," including equipment, minus any applicable deductible shown in the Declarations. We will pay for loss to "your covered auto" caused by:

Although the subject of this contract was the lease of an automobile, a significant part of the contract concerned insurance. . . . For these reasons, and because the contract was, like most insurance contracts, a "form" contract that had many clauses prepared by the insurer and offered on a take-it-or-leave-it basis, we feel that the appropriate interpretive principles are those normally applicable to insurance contracts.

Quigley, 373 A.2d at 812.

93. See *supra* note 89.

94. Comprehensive or "other than collision coverage" is the other form of automobile property insurance common to automobile insurance. Both coverages, if purchased, are contained in the section of the policy entitled "Coverage For Damage To Your Auto." For a detailed discussion of comprehensive coverage in the context of the primary thesis, see *infra* Section V.

95. See 11 RUSS & SEGALLA, *supra* note 23, chap. 156, § 156:4, at 156-10.

96. *Id.*

1. Other than "collision" only if the Declaration indicates that Other Than Collision Coverage is provided for that auto.
2. "Collision" only if the Declarations indicate that Collision Coverage is provided for that auto
- B. "Collision" means the upset of "your covered auto" or its impact with another vehicle or object.⁹⁷

The above coverage provides comprehensive and collision protection solely against "direct and accidental losses to your covered auto or any non-owned auto, including its equipment."⁹⁸ "Direct" refers to the causal relationship and means immediate or proximate — not remote.⁹⁹ "Accidental" usually means sudden and unexpected from the insured's standpoint.¹⁰⁰

Courts ascertaining the validity of prohibitive use restrictions in the context of collision damage waivers have relied exclusively upon three variance principles. Those principles are (1) ambiguity; (2) unconscionability; and (3) reasonable expectations of the insured.

A. Ambiguity¹⁰¹

"Ambiguity is one of the oldest and most implemented variance principles."¹⁰² The rule of ambiguity is simply that an ambiguity in an insurance policy will be construed against its drafter and in favor of the non-drafting party.¹⁰³ A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible to, more than one reasonable interpretation when the policy is read as a whole.¹⁰⁴ Ambiguity in an insurance contract can arise from three sources: (1)

97. PERSONAL AUTO POLICY, *supra* note 9.

98. PERSONAL AUTO POLICY, *supra* note 9.

99. See PRAHL, *supra* note 15, at 139; 11 RUSS & SEGALLA, *supra* note 23, chap. 156, § 156:21, at 156-36.

100. See PRAHL, *supra* note 15, at 139; 11 RUSS & SEGALLA, *supra* note 23, chap. 156, § 156:20, at 156-35; see generally *supra* section III.

101. Footnotes 101-16 and accompanying text were substantially reprinted from Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 WAKE FOREST L. REV. 295, 328-31 (1999).

102. KEETON & WIDISS, *supra* note 1, § 6.3, at 628.

103. See *id.*

104. See, e.g., *United States Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 572 (2d Cir. 1991)(applying New York substantive law); *Federated Guar. Life Ins. Co. v. Dunn*, 439 So. 2d 1283, 1285 (Ala. Civ. App. 1983); *Delgado v. Heritage Life Ins. Co.*, 203 Cal. Rptr. 672, 677 (Ct. App. 1984); *National Cas. Co. v. Great Southwest Fire Ins. Co.*, 833 P.2d 741, 746 (Colo. 1992); *Murr v. Selag Corp.*, 747 P.2d 1302, 1310 (Idaho Ct. App. 1987); *United States Fire Ins. Co. v. Coleman*, 754 S.W.2d 941, 944 (Mo. Ct. App. 1988); *Union Ins. Co. v. Land & Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773, 776 (1995); *Graber v. Engstrom*, 384 N.W.2d 307, 309 (N.D. 1986); *Weisman v. Green Tree Ins. Co.*, 670 A.2d 160, 161 (Pa. Super. Ct. 1996); *Greendig v. Tennessee Farmers Mut. Ins. Co.*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951); *Baehmer v. Viking Ins. Co.*, 827 P.2d 1113, 1115 (Wash. Ct. App. 1992); *Pilling v. Nationwide Mut. Fire Ins. Co.*, 500 S.E.2d 870, 872 (W. Va. 1997).

inconsistent policy provisions;¹⁰⁵ (2) policy organization;¹⁰⁶ (3) ambiguous language.¹⁰⁷ Whether an ambiguity exists is a question of law.¹⁰⁸ The determination that an ambiguity exists as a result of inconsistent policy provisions or poor policy organization requires little more than an examination of the entire policy and application of the controlling rule.¹⁰⁹ However, determining whether policy language is ambiguous requires the application of a detailed legal analysis.

The interpretation of an insurance policy is primarily the responsibility of the court. In performance of this responsibility, courts are guided by the most fundamental principle of contract interpretation, that "[a]n insurance contract should be construed to carry out the intention of the parties, and that intention should be ascertained, if possible, from the language in the policy alone."¹¹⁰ This is the

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105. See, e.g., *Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 325 So. 2d 143, 151 (Ala. 1975); *Home Indem. Co. v. City of Marianna*, 761 S.W.2d 171, 173 (Ark. 1988); *Coit v. Jefferson Standard Life Ins. Co.*, 168 P.2d 163, 169 (Cal. 1946); *Imperial Cas. & Indem. Co. v. State*, 714 A.2d 1230, 1237 (Conn. 1998); *Reliance Life Ins. Co. v. Lynch*, 197 So. 723, 727-28 (Fla. 1940) (Brown, J., dissenting); *Davis v. United Am. Life Ins. Co.*, 111 S.E.2d 488, 492 (Ga. 1959); *National Discount Shoes, Inc. v. Royal Globe Ins. Co.*, 424 N.E.2d 1166, 1171 (Ill. App. Ct. 1981); *Brumley v. Lee*, 963 P.2d 1224, 1226 (Kan. 1998); *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 805-06 (Mich. 1989); *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 644-45 (Minn. 1986); *Oleson v. Farmers Ins. Group*, 605 P.2d 166, 169 (Mont. 1980); *American Shops, Inc. v. Reliance Ins. Co.*, 97 A.2d 513, 517 (N.J. Super. Ct. Law Div. 1953); *American Mfrs. Mut. Ins. Co. v. Ingram*, 271 S.E.2d 46, 53 (N.C. 1980); *C.P.A. Co. v. Jones*, 263 P.2d 731, 735 (Okla. 1953); *Elliott Leases Cars, Inc. v. Quigley*, 373 A.2d 810, 813 (R.I. 1977); *Marson Coal Co. v. Insurance Co.*, 210 S.E.2d 747, 750 (W. Va. 1974).
106. See, e.g., *McRaven v. F-Stop Photo Labs, Inc.*, 660 S.W.2d 459, 461-62 (Mo. Ct. App. 1983); *Atwood v. Hartford Accident & Indem. Co.*, 365 A.2d 744, 746 (N.H. 1976).
107. See KEETON & WIDISS, *supra* note 1; see, e.g., *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838, 839-40 (2d Cir. 1981); *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979).
108. See *Columbia Heights*, 275 N.W.2d at 34.
109. See, e.g., *Davis*, 111 S.E.2d at 492; *Rusthoven*, 387 N.W.2d at 644-45; *Atwood*, 365 A.2d at 746-47.
110. *Wheeler v. Allstate Ins. Co.*, 814 P.2d 9, 10 (Colo. Ct. App. 1991). For expression of similar views, see *Hall v. American Indem. Group*, 648 So. 2d 556, 559 (Ala. 1994); *Home Indem. Co. v. Wilson*, 489 P.2d 244, 247 (Ariz. 1971); *Floyd v. Otter Creek Homeowners Ass'n*, 742 S.W.2d 120, 123 (Ark. Ct. App. 1988); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1271 (Cal. 1993); *Hitz v. Allied Am. Mut. Life Ins. Co.*, 195 A.2d 446, 448 (Conn. Cir. Ct. 1963); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 152, 155-56 (Del. 1996); *State Farm Fire & Cas. Ins. Co. v. Deni Assocs., Inc.*, 678 So. 2d 397, 400 (Fla. Dist. Ct. App. 1996); *Luzar v. Western Surety Co.*, 692 P.2d 337, 341 (Idaho 1984); *Willison v. Economy Fire & Cas. Co.*, 690 N.E.2d 1073, 1075 (Ill. App. Ct. 1998); *Aetna Ins. Co. v. Rodriguez*, 504 N.E.2d 1030, 1032 (Ind. Ct. App. 1987), *rev'd*, 517 N.E.2d 386 (Ind. 1988); *Loyd v. Federal Kemper Life Assurance Co.*, 518 N.W.2d 374, 375 (Iowa 1994); *Farm Bureau Mut. Ins. Co. v. Old Hickory Cas. Ins. Co.*, 810 P.2d 283, 286 (Kan. 1991); *Benton v. Long Mfg. N.C., Inc.*, 550

supreme rule and all other rules of construction are subservient to it.¹¹¹

Ambiguity, no matter the source, "should first be resolved by giving effect to the intention of the parties."¹¹² If the intention of the parties can be ascertained, the court should not construe the policy in favor of either of the parties, but should give effect to the parties' mutual intentions.¹¹³

If an ambiguity exists as a result of a reading of the policy language, the court may resolve the ambiguity by resorting to extrinsic evidence.¹¹⁴ The insurer must prove not only that the words and ex-

So. 2d 859, 860 (La. Ct. App. 1989); *Maine Drilling & Blasting, Inc. v. Insurance Co. of N. Am.*, 665 A.2d 671, 675 (Me. 1995); *JMP Assocs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 693 A.2d 832, 834 (Md. 1997); *Western Nat'l Mut. Ins. Co. v. United States Fire Ins. Co.*, 269 N.W.2d 34, 36 (Minn. 1978); *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 901 (Mo. 1990); *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322, 324 (1996); *Caruso v. John Hancock Mut. Life Ins. Co.*, 57 A.2d 359, 360 (N.J. 1948); *Loya v. State Farm Mut. Ins. Co.*, 888 P.2d 447, 451 (N.M. 1994); *Hickman v. Saunders*, 645 N.Y.S.2d 49, 50 (1996); *Employers Reinsurance Corp. v. Landmark*, 547 N.W.2d 527, 532 (N.D. 1996).

111. See 13 JOHN ALAN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7385 (1976 & Supp. 1999).

112. *Board of County Comm'rs v. Colorado Counties Cas. & Property Pool*, 888 P.2d 352, 355 (Colo. Ct. App. 1994).

113. See *id.*; *supra* note 110 and accompanying text.

114. Both patent and latent ambiguities may arise from the language used in insurance policies. See *C. & A. Constr. Co. v. Benning Constr. Co.*, 509 S.W.2d 302, 303 (Ark. 1974); *North Am. Philips Corp. v. Aetna Cas. & Sur., Co.*, No. 88C-JA-155, 1995 Del. Super. LEXIS 356, at *6 (Del. Super. Ct. Mar. 10, 1995); *Hall v. Equitable Life Assurance Soc'y of the United States*, 295 N.W. 204, 206 (Mich. 1940); *Koplin v. Franklin Fire Ins. Co.*, 44 A.2d 877, 878 (Pa. Super. Ct. 1945); *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).

A patent ambiguity exists when the language on its face is capable of more than a single interpretation and "arises from the use of defective, obscure, or insensible language." *Crown Mgmt. Corp. v. Goodman*, 452 So. 2d 49, 52 (Fla. Dist. Ct. App. 1984). "Extrinsic evidence is inadmissible if the ambiguity is patent, because such evidence would, in effect, allow the court to rewrite the contract for the parties by supplying information the parties themselves did not choose to include." *Id.* A latent ambiguity exists when patently unambiguous language becomes ambiguous when applied. "A latent ambiguity . . . is said to exist where a contract fails to specify the rights or duties of the parties in certain situations and extrinsic evidence is necessary for interpretation or a choice between two possible meanings." *Id.*

Although there appears to be some divergence of opinion as to when parol evidence is properly admitted because of the latent ambiguity—patent ambiguity dichotomy, the distinction between the type of ambiguity involved is one of form over substance. The growing and better reasoned trend of authority indicates that the introduction of parol evidence to probe the true intent of the parties is proper, irrespective of any technical classification of the type of ambiguity present.

Id. (quoting *Royal Continental Hotels, Inc. v. Broward Vending, Inc.*, 404 So. 2d 782, 784 (Fla. Dist. Ct. App. 1981)).

pressions used in the insurance contract are susceptible to the construction sought, but that it is the only reasonable construction that may fairly be placed on them.¹¹⁵ Courts, in assessing whether the insurer's interpretation of the policy is the only reasonable one, are free to look beyond the language of the policy. Relevant considerations may include: (1) the ordinary meaning of the words in question; (2) how reasonable persons would construe the words in question; (3) availability of clearer language; and (4) the nature, type, and purpose of the insurance in question.¹¹⁶ If the court determines that the words and expressions are susceptible to more than one meaning and that the insured's construction was reasonable, the rule of ambiguity is applied.¹¹⁷

The seminal decision applying the principle of ambiguity to a collision insurance dispute is *Elliott Leases Cars, Inc. v. Quigley*.¹¹⁸ The plaintiff Elliott Leases Cars leased an automobile to John Quigley, in his capacity as president of Rhode Island Buckle, Inc. The defendant was Mr. Quigley's wife. While driving the car with her husband's permission, defendant was involved in an accident. Defendant's negligence was the cause of the accident. Elliott Leases Cars brought suit against defendant for the total cost of repairing the car. Mrs. Quigley denied liability on the ground that the lease agreement obligated plaintiff to provide collision insurance for her benefit. The trial court held for plaintiff and defendant appealed.

The contractual relationship between the parties was embodied in two documents: a lease agreement and a document entitled "Automobile Leasing Order." Both documents were standard forms prepared by Elliott. The "Automobile Leasing Order" was a single printed page which provided, among other things, that plaintiff would pay for "ACCIDENT REPAIRS — 100/deduct—Due to Collision (or Upset) per Accident."¹¹⁹ Mrs. Quigley contended that this provision obligated defendant to provide collision insurance without regard to negligence.

Plaintiff in response argued that the lease agreement explicitly negated any obligation to provide insurance for accidents caused by the negligence of the operator of the leased vehicle. The lease agreement

115. See *Vargas v. Insurance Co. of N. Am.*, 651 F.2d 838, 840 (2d Cir. 1981). "The insurer is 'obliged to show (1) that it would be unreasonable for the average man reading the policy to [construe it as the insured does] and (2) that its own construction was the only one that fairly could be placed on the policy.'" *Id.* (quoting *Sincoff v. Liberty Mut. Fire Ins. Co.*, 183 N.E.2d 899, 901 (N.Y. 1962)).

116. See, e.g., *Vargas*, 651 F.2d at 840-42 (using a number of interpretive techniques to analyze the contract in question); *Jacobs v. Central Sec. Mut. Ins. Co.*, 551 N.E.2d 1059, 1061 (Ill. App. Ct. 1990)(explaining various considerations for the court if faced with a potential ambiguity).

117. See *supra* note 116.

118. 373 A.2d 810 (R.I. 1977).

119. *Id.* at 811.

was a two-page document containing twenty-eight provisions. Clause 2 of the agreement provided in part that:

Lessee further agrees . . . if the loss is the result of any violation of the terms or conditions of this agreement or the result of careless, reckless or abusive handling of the automobile. . . . Lessee shall be liable for the full amount of the loss without regard to the limitation of \$100.00¹²⁰

The Rhode Island Supreme Court, in addressing the merits of the case, noted that it could not look to only one or the other of the two documents.¹²¹ Rather, according to the court, both documents together formed the contract between the parties.¹²²

The lease agreement clearly and unequivocally purported to exclude negligently caused accidents from the collision coverage promised in the "Automobile Leasing Order." Consequently, ambiguity arose as a result of inconsistent provisions in the contract.¹²³ Despite this fact, the court, rather than merely applying the rule of ambiguity to the facts of the case,¹²⁴ engaged in the detailed analysis normally applied where the source of the ambiguity is unclear or equivocal language.¹²⁵ This analysis allowed the court not only to consider how an ordinary person or purchaser would interpret the collision insurance provision but also the purpose and nature of collision coverage.¹²⁶ The expanded analysis used by the court in *Quigley*, while certainly unnecessary in light of the source of the ambiguity,¹²⁷ reflects a judi-

120. *Id.* at 811-12.

121. *See id.* at 811.

122. *See id.*

123. *See id.* at 812-13.

124. *See supra* note 109 and accompanying text.

125. *See supra* notes 114-17 and accompanying text.

126. These considerations led the court to observe that:

In this case, the leasing order provided that plaintiff would pay for "accident repairs" caused by collision or upset, subject to a \$100 deductible. The ordinary reader would not assume that an unqualified promise of this nature only covered accidents not caused by the negligence of the operator of the automobile. Indeed just the opposite is true. Collision insurance is generally understood to cover whatever accidents occur, regardless of the negligence of the operator. An exclusion which limits coverage to nonnegligent accidents significantly reduces the scope of the insurance. Not only does it reduce the total number of accidents covered, but it eliminates coverage in precisely those cases in which it is most needed — that is, where there may be no negligent tortfeasor from whom the insured may recover. The ordinary reader of the leasing order provision would therefore assume that collision insurance was provided without regard to negligence.

Quigley, 373 A.2d at 812.

127. Conflicting interpretations or opposite conclusions from different jurisdictions regarding the legal effect or meaning of policy language or provisions can also give rise to ambiguity. *See State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P.2d 727, 732 (Ariz. 1989); *Employers Mut. Liab. Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 549 S.W.2d 267, 268 (Ark. 1977); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 397 (Mich. 1991); *Maddox v. Colonial Life & Accident Ins. Co.*, 280

cial concern for fairness in the interpretation and enforcement of insurance contracts. In essence, the court's use of the expanded analysis suggests that interpretations of collision coverage are not totally devoid of policy considerations.

B. Unconscionability¹²⁸

Courts are ordinarily only concerned with the legality of contracts.¹²⁹ Consequently, a contract containing clear and unambiguous language that is not the result of fraud, duress, undue influence, or mistake is usually enforced according to its terms. Nevertheless, courts are not powerless, and if the circumstances of the case require, they may ignore this rule and examine the wisdom and fairness of a contract. A court may refuse to enforce a contract or any clause contained therein if it determines that the contract or clause was unconscionable at the time it was made.¹³⁰

An unconscionable contract is one that no person "in his senses and not under delusion would make . . . and [that] no honest and fair man would accept."¹³¹ The doctrine of unconscionability allows the court to rule directly on the unconscionability of the contract, or clause therein, without having "to avoid unconscionable results by interpretation."¹³² A contract is unconscionable if two conditions exist: (1) one of the parties to the contract lacks a meaningful choice about whether

S.E.2d 907, 910 (N.C. 1981); *Cimarron Ins. Co. v. Travelers Ins. Co.*, 355 P.2d 742, 746-47 (Or. 1960). But see *ACL Technologies, Inc. v. Northbrook Property and Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, (1993) (declining to follow view that an ambiguity arises merely because there is conflicting case law); *FDIC v. American Cas. Co.*, 528 N.W.2d 605, 608 (Iowa 1995) (refusing to follow view that an ambiguity arises merely because there is conflicting case authority); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996) (holding that conflicting judicial interpretation is a factor that warrants consideration in assessing the existence of an ambiguity, but it is in no way dispositive); *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 624 (Md. 1995) (stating that conflicting judicial interpretation is a factor that warrants consideration in assessing the existence of an ambiguity, but is in no way dispositive); *Standard Life Ins. Co. v. Hughes*, 315 S.W.2d 239, 242 (Tenn. 1958) (recognizing that insurance policies will not be automatically construed against the insurer where judicial construction is clear); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 459 (Tex. 1997) (declining to follow view that an ambiguity arises merely because there is conflicting case authority).

128. Footnotes 129-33 and accompanying text were substantially reprinted from Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 WAKE FOREST L. REV. 295, 326 (1999).

129. See *Joseph v. Donover Co.*, 261 F.2d 812, 824 (9th Cir. 1958).

130. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

131. *Hume v. United States*, 132 U.S. 406, 411 (1889). Similarly, see *Lloyd v. Service Corp. of Ala.*, 453 So. 2d 735, 739 (Ala. 1984) and *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976).

132. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981).

to accept the provision in question; (2) the challenged provision unreasonably favors the other party.¹³³

The doctrine of unconscionability counteracts two forms of abuses. The first type relates to deficiencies in the contract formation process. The second type of abuse involves the ramifications of enforcing blatantly unfair contract terms. In other words, unconscionability has both a procedural and substantive component.¹³⁴ More specifically, procedural unconscionability is concerned with improprieties that occurred during the formation of the contract, while substantive unconscionability involves those cases where a clause or term in a contract is one-sided or oppressive.¹³⁵

In *Val Preda Leasing, Inc. v. Rodriguez*¹³⁶ the court tested the bounds of the doctrine of unconscionability in the context of a collision damage waiver provision. In *Val Preda*, defendant leased a car from plaintiff. Defendant declined the collision damage waiver and accepted collision responsibility in the amount of \$600. However, a provision in the agreement provided that renter would be liable for all collision damage to the leased vehicle if damage occurred during a violation of any of the prohibitive uses. Defendant fell asleep while driving the leased vehicle, collided with a telephone pole, and wrecked the car. One of the prohibitive use provisions provided that the vehicle not be used by anyone not sufficiently alert to drive. Defendant paid \$600 to plaintiff, but he refused to pay for the remaining damage.

The appellate court in *Val Preda* rejected the defendant's argument that the rental agreement was ambiguous.¹³⁷ Nevertheless, in-

133. See *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 716 (Ala. 1989); *Rodgers v. Tecumseh Bank*, 756 P.2d 1223, 1226 (Okla. 1988); *Koval v. Liberty Mut. Ins. Co.*, 531 A.2d 487, 491 (Pa. Super. Ct. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

134. See *Truta v. Avis Rent A Car Sys., Inc.*, 238 Cal. Rptr. 806, 816 (Cal. Ct. App. 1987); *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403, 409-10 (Ill. App. Ct. 1980); *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1040-43 (Utah 1985); *Planet Ins. Co. v. Wong*, 877 P.2d 198, 202 (Wash. Ct. App. 1994); *Northwest Acceptance Corp. v. Hesco Constr., Inc.*, 614 P.2d 1302, 1307 n.10 (Wash. Ct. App. 1980).

135. See *supra* note 134.

Factors to be considered are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of [procedural] unconscionability.

Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 410 (Ill. App. Ct. 1980). "Substantive unconscionability concerns the question whether the terms themselves are commercially reasonable." *Id.*

136. 540 A.2d 648 (Vt. 1987).

137. See *id.* at 649.

spired by equitable considerations, the court proceeded to determine whether enforcing the contract would be unconscionable.¹³⁸ The contract seemingly limited defendant's collision damage liability to \$600. Furthermore, the extensive list of prohibitions in effect made the renter liable for virtually all damage caused by the renter. However, these results could be ascertained from reading and digesting the entire contract. Following these findings the court in *Val Preda*, after also concluding that the factors relevant to unconscionability in the formation of a contract were not present,¹³⁹ concluded that the terms of the contract were unconscionable and substantively unfair.¹⁴⁰ This finding was based on the fact that the renter would have difficulty in comprehending the consequences of the substantial exceptions, and

if the numerous exceptions were given effect, the renter would be liable for damage caused by virtually every type of driver error, including making an illegal left-hand turn, . . . because that is operating the vehicle in an 'unlawful manner' . . . driving while intoxicated, . . . or by falling asleep . . . The exceptions swallow the protection.¹⁴¹

As observed in the discussion of ambiguity, the judicial analysis of unconscionability also supports the conclusion that policy considerations are present in the analysis of collision insurance.

C. Reasonable Expectations Doctrine

The intellectual foundation of the reasonable expectations doctrine was first articulated as an overarching set of principles used to assist in explaining the results of disparate insurance law decisions that appeared to be based on a number of different rationales.¹⁴² Since that time courts throughout the country have attempted to shape these principles into definitive legal rules. This effort has led to the development and recognition of different versions of the doctrine.¹⁴³

138. See *id.* The *Val Preda* court, citing *Trustees of Net Realty Holding Trust v. AVCO Financial Serv. of Barre, Inc.*, 476 A.2d 530, 533 (Vt. 1984), observed, "[The] logic of an agreement, without more, is not a proper concern for the court in the absence of public policy considerations, fraud, overreaching, and similar concerns." *Id.* at 649.

139. See *Val Preda* at 652; see also *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986)(discussing procedural unconscionability in the formation of a rental car collision damage waiver agreement).

140. See *Val Preda*, 540 A.2d at 652.

141. *Id.*

142. See Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 825 (1990)(citing Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970)).

143. Judicial attempts at defining the contours of the reasonable expectations doctrine have only increased the uncertainty regarding the theoretical underpinnings, scope, and details of application of the doctrine. See, e.g., Henderson, *supra* note 142, at 824, 838; Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 345, 370-71 (1986).

These versions and the rules applicable thereto have been classified, at least by one commentator, as (1) construction of an ambiguous term in the insurance contract to satisfy the insured's reasonable expectations; (2) refusal to enforce the "fine print" of an insurance contract because it limits more prominent provisions giving rise to the insured's expectation; (3) refusal to enforce an insurance contract provision when it would frustrate the reasonable expectations of coverage created by the insurer outside of the contract.¹⁴⁴ Decisional law suggests that further refinement of these versions would be appropriate. Accordingly, case law suggests that version (2) is a variant of version (1) — ambiguity — and not a separate approach to which entirely distinct rules are applicable.¹⁴⁵ Whether one accepts the existence of two or three versions of the reasonable expectations doctrine does not change the fact that only two competing decisional approaches to interpreting insurance contracts have evolved: (1) the "traditional" or "formalist" approach; (2) the "functional" or "reasonable expectation approach."¹⁴⁶

144. See Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1467 (1989).

145. See *infra* note 147 and accompanying text.

146. See *Collins v. Farmers Ins. Co.*, 822 P.2d 1146, 1159 (Or. 1991)(Unis, J., dissenting). Justice Unis, dissenting, explained the similarities and distinctions between these interpretative approaches:

Under the "traditional" or "formalist" approach, the court looks to the "four corners" of the insurance policy and interprets it by applying rules applicable to all contracts in general. The insured is held to have read and to have understood the clear language of the policy. Extrinsic evidence relating to the insurance contract may be examined for the purpose of determining the parties' intention to an objective analysis of the "four corners" of the contract.

....

The rationale behind the "formalist" approach is that contracts of insurance rest upon and are controlled by the same principles of law that apply to other contracts, and the parties to an insurance contract may provide such provisions as they deem proper as long as the contract does not contravene law or public policy (citations omitted).

The competing approach to insurance contract interpretation — the "functional" or "reasonable expectation" approach — is that the policyholder's reasonable expectations to coverage under the insurance policy should be honored even though those expectations vary from the policy provisions.

The "functional" or "reasonable expectation" approach is supported by the notion that insurance contracts are not ordinary contracts negotiated by parties with roughly equal bargaining strength. Rather, they are largely contracts of adhesion, where the insurance company, in preparing a standardized printed form, has the superior bargaining position, and the insured has to accept such a policy on a "take-it-or-leave-it" basis if the insured wants any form of insurance protection.

....

Restatement (Second) of Contracts, § 211 (1981), "[r]epudiates the 'four-corners' ['traditional' or 'formalist'] approach to contract interpreta-

Despite the vast uncertainty that exists with regard to the scope and details of application of the reasonable expectations doctrine, some widely accepted definitive rules have developed pertaining to each version. The more popular or narrow version of the doctrine, followed in a majority of jurisdictions, treats the reasonable expectation doctrine as a corollary to the rule of ambiguity.¹⁴⁷ In this context, the doctrine is viewed as a tool of contract interpretation and is applicable only if an ambiguity is found to exist in the policy.¹⁴⁸ The fact that an insurance policy is a contract of adhesion is not reason enough, in and of itself, to apply the doctrine.¹⁴⁹ Rather, the objectively reasonable expectation of an insured is uniformly honored even though painstaking study of the policy provisions have negated those expectation when (1) the policy is ambiguous; (2) the policy contains exclusions which are masked by technical or obscure language; or (3) exclusions are hidden in policy provisions.¹⁵⁰ Either of these circumstances can

tion in the standardized agreement setting and in effect approves a doctrine of 'reasonable expectations.'"

....
A growing number of courts use the "functional" approach to protect the "reasonable expectations" of the insured policyholder from possible denial of coverage that might result under the "traditional" or "formalist" contractual analysis of an insurance policy.

There is no disagreement between the "formalist" and the "functional" approaches whenever the insurance policy is ambiguous or susceptible to two or more reasonable interpretations. . . .

Id. at 1159-61 (citations omitted).

147. See, e.g., *Morris v. Atlas Assurance Co.*, 204 Cal. Rptr. 95 (Cal. Ct. App. 1984); *Derrickson v. American Nat'l. Fire Ins. Co.*, 538 A.2d 1113 (Del. 1988); *Penalosa Coop. Exch. v. Farmland Mut. Ins. Co.*, 789 P.2d 1196 (Kan. Ct. App. 1990); *Simon v. Continental Ins. Co.*, 724 S.W.2d 210 (Ky. 1986); *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759 (La. 1994); *Jefferson Ins. Co. v. City of Holyoke*, 503 N.E.2d 474 (Mass. App. Ct. 1987) (discussing the split among courts as to whether application of reasonable expectations doctrine requires an ambiguity); *Vanguard Ins. Co. v. Clarke*, 475 N.W.2d 48 (Mich. 1991); *Hubred v. Control Data Corp.*, 442 N.W.2d 308 (Minn. 1989); *Rodriguez v. General Accident Ins. Co. of Am.*, 808 S.W.2d 379 (Mo. 1991); *Farmers Ins. Exch. v. Young*, 832 P.2d 376 (Nev. 1992); *Max True Plastering Co. v. USF & G*, 912 P.2d 861 (Okla. 1996). But see, e.g., *Sharpe v. Liberty Mut. Ins. Co.*, 1996 Mass. Super. LEXIS 441 (Mass. 1996) (holding that ambiguity must exist in order to apply reasonable expectations doctrine); *Farmers Ins. Exch.*, 832 P.2d at 378-79; *Rummel v. Lexington Ins. Co.*, 945 P.2d 970 (N.M. 1997); *Employer Mut. Cas. Co. v. Pires*, 723 A.2d 295 (R.I. 1999); *State Farm Gen. Ins. Co. v. Emerson*, 687 P.2d 1139 (Wash. 1984); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998); *Kremers-Urban Co. v. American Employers Ins. Co.*, 351 N.W.2d 156 (Wis. 1984).

148. See *supra* note 147.

149. See *Rahdert, supra* note 143, at 338; *supra* note 147; see also *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 395 (Ariz. 1984) (holding that "most insureds develop a 'reasonable expectation' that every loss will be covered by their policy"); *Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 803 & n.6 (Utah 1992) (holding that "form contracts are essential to the economic viability of the insurance industry").

150. See *supra* note 147.

be construed to give rise to a latent or patent ambiguity.¹⁵¹ This version of the doctrine is in keeping with the "traditional" or "formalist" approach to contract interpretation.¹⁵²

The second or broad version of the doctrine does not require a finding of ambiguity as a condition precedent to application of the reasonable expectations of the insured doctrine.¹⁵³ The fact that an insurance policy is a contract of adhesion is enough to trigger application. The court is justified in rewriting an otherwise clear and unambiguous policy if (1) the insurer knew or should have known of the insured's expectation; (2) the insurer created or helped to create those expectations; or (3) the insured's expectations are objectively reasonable in light of the circumstances and facts of the case.¹⁵⁴ In the context of this version, the reasonable expectations doctrine is an instrument of contract enforcement.

The seminal opinion in which the court applied the reasonable expectations doctrine to a collision damage waiver provision is *Automobile Leasing & Rental, Inc. v. Thomas*.¹⁵⁵ In *Thomas*, defendant Virginia Thomas rented a car from Americar while vacationing in Las Vegas. The lease agreement provided Thomas with the option of purchasing a collision damage waiver provision pursuant to which the lessor would waive all liability claims against the renter provided the car was "used in conformity with [the] rental agreement."¹⁵⁶ Thomas purchased this option and was subsequently involved in an accident when her car was struck from behind while making a left turn. Thomas received a citation for making a left turn from an improper position.

Lessor's main argument at trial was that Thomas breached the lease agreement because she failed to use the car in conformity with the lease agreement. More specifically, lessor contended that Thomas violated the prohibitive use restriction which provided that the car not be used in an "unlawful manner." According to lessor the fact that

151. See *supra* note 114.

152. See *supra* note 146.

153. At least five jurisdictions have adopted the reasonable expectation doctrine and concluded that it may be applied even in the absence of ambiguity. See, e.g., *Maynard v. State Farm Mut. Ins. Co.*, 902 P.2d 1328 (Alaska 1995); *Amoco Oil v. Ervin*, 908 P.2d 493 (Colo. 1995); *Hawaiian Ins. & Guar. Co. v. Brooks*, 686 P.2d 23 (Haw. 1984); *West Trucking Line, Inc. v. Northland Ins. Co.*, 459 N.W.2d 262 (Iowa 1990); *Lindstrom v. Hanover Ins. Co.*, 649 A.2d 1272 (N.J. 1994).

At least five states have expressly rejected the doctrine of reasonable expectations. See, e.g., *Deni Assoc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998); *Farmers Ins. Co. v. Talbot*, 987 P.2d 1043 (Idaho 1999); *Ins. Co. of N. Am. v. Adkisson*, 459 N.E.2d 310 (Ill. App. Ct. 1984); *Sterling Merchandise Co. v. Hartford Ins. Co.*, 506 N.E.2d 1192 (Ohio Ct. App. 1986); *Allen*, 839 P.2d at 807.

154. See *supra* note 153.

155. 679 P.2d 1269 (Nev. 1984).

156. *Id.* at 1270.

Thomas was making a left turn from an improper position and received a citation for doing so voided the policy.

The *Thomas* court, in an extremely short opinion, noted that the appropriate interpretive approach was the objectively reasonable expectations of the insured. The court, applying the narrow version of the doctrine, concluded that the waiver agreement was ambiguous because the limitation on coverage was neither apparent from the face of the agreement nor from a simple reading of the contract.¹⁵⁷ Consequently, an ordinary reader, such as Thomas, would not have assumed that the coverage purchased only covered accidents not caused by the negligence of the purchaser.

A similar result was reached by the Supreme Court of Alaska in *Lauvetz v. Alaska Sales & Serv.*¹⁵⁸ In *Lauvetz*, Thomas Lauvetz and John Osborne leased a car from Alaska Sales and Service. During the process of leasing the car Osborne received an offer for an optional collision damage waiver, and he accepted it. The collision damage waiver added \$8.95 per day to the basic daily rental rate.

There were no indications of the scope of the collision damage waiver on the face of the rental agreement. However, directly above the collision damage waiver box were the words "See Terms and Conditions." The right flap of the travel folder, which opened into three panels, contained the terms and conditions. The terms and conditions were printed in black and were legible. Neither Lauvetz nor Osborne read the terms and conditions.

Several days following the lease, the vehicle was damaged while Lauvetz was driving. Lauvetz was intoxicated at the time of the accident. He was charged with reckless driving, to which he pled no contest. Alaska Sales subsequently filed suit against both Lauvetz and Osborne seeking compensatory and punitive damages. Alaska Sales contended that Lauvetz's intoxication and reckless driving violated two prohibitive use restrictions contained in the rental agreement.

The court in *Lauvetz* expressly examined the merits of whether the narrow or broad version of the reasonable expectations doctrine should be applied to the facts of the case. Opting for application of the broader version the court observed that the relevant question

is not whether a prohibition against drunk driving is unreasonable; any renter would certainly know that the law prohibits drunk driving on pain of severe penalties. Rather, the relevant question here is whether the purchaser of the damage waiver reasonably expected the waiver to be subject to any exclusions. We conclude that a consumer would not reasonably expect the damage waiver to be less than complete.¹⁵⁹

157. *See id.* at 1270-71.

158. 828 P.2d 162 (Alaska 1991).

159. *Id.* at 165 (citation omitted).

Despite the existence of two distinct versions, it is universally accepted that the reasonable expectations doctrine is closely "related to the policy against unconscionable terms and the rule of interpretations against the draftsman"¹⁶⁰ — ambiguity.

V. COMPREHENSIVE COVERAGE

Part D — Coverage for Damage to Your Auto provides two forms of automobile property protection — collision and comprehensive.¹⁶¹ Comprehensive coverage, if purchased, is provided under the policy language "Other Than Collision Coverage."¹⁶² Other than collision coverage is rarely, if ever, specifically defined in the policy. Rather, most policies contain a list of perils that supposedly constitute loss caused by other than collision.¹⁶³ This list, however, neither defines the phrase nor provides a comprehensive-all-inclusive listing of the perils that are covered under other than collision coverage. Other than collision or comprehensive insurance is an all-risk¹⁶⁴ form of property insurance. The protection afforded by the coverage is subject only to the exclusions in the auto physical damage section of the policy and the requirement that the loss be direct and accidental.¹⁶⁵ Comprehensive coverage protects against direct and accidental losses. By virtue of this language and the purpose of the coverage, any provision defining "losses" insured to include only those losses that were "direct and accidental" does not relieve the insurer of liability for losses caused by the intentional acts of third parties.¹⁶⁶ A contrary construction would contravene public policy because a provision of such nature would negate the coverage expressly afforded for theft, larceny, or vandalism — all intentional acts.¹⁶⁷

160. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

161. See *supra* note 97 and accompanying text.

162. See *id.*

163. Losses caused by the following are considered to be other than "collision":

1. Missiles or falling objects;
2. Fire;
3. Theft or larceny;
4. Explosion or earthquake;
5. Hail, water, or flood;
6. Malicious mischief or vandalism;
7. Riot or civil commotion;
8. Contact with bird or animal;
9. Breakage of glass

See PERSONAL AUTO POLICY *supra* note 9.

164. An all-risks or open perils policy covers all accidental losses except those that are specifically excluded.

165. See *supra* notes 99 and 100 and accompanying text.

166. See 11 RUSS & SEGALLA, *supra* note 23, chap. 156, § 156:20, at 156-35.

167. See *supra* note 163.

Under a comprehensive policy covering "direct and accidental losses" the insured has the burden of proving that the loss satisfies both prerequisites. As is the case with collision coverage, "direct" refers to causal relationship and means immediate or proximate — not remote.¹⁶⁸ Likewise, "accidental" means sudden and unexpected from the standpoint of the insured. In the context of comprehensive insurance, the perspective of the insured approach rarely, if ever, emanates out of expressed policy language as is the case in automobile liability insurance. Rather, because collision and comprehensive insurance are forms of property insurance, courts, for policy reasons, impliedly recognize not only the insurer's but also society's interest in discouraging moral hazard and unjust enrichment. Consequently, comprehensive insurance provisions that exclude coverage for non-accidental or intentional losses caused by the insured are valid.¹⁶⁹ However, the presumed validity of these provisions does not alone resolve the question of whether an insurer should automatically be relieved from its obligations to provide comprehensive coverage when (1) a vehicle has been used in an unlawful manner; or (2) an unlawful event may have occurred during its use by the insured.

As observed earlier in the discussion of liability insurance and the intentional injury exclusion, the perspective of the insured approach has two dimensions. Pursuant to the first dimension, the insurer is relieved of its obligations under the policy if the insured acted with specific intent to cause the loss.¹⁷⁰ Specific intent does not exist where the insured's intentional act results in unintentional loss.¹⁷¹ Rather, specific intent requires that the insured intended the consequences of his intentional act.¹⁷² The second dimension, used to assess whether a loss is accidental, is to infer intent to cause harm where the loss is the natural and probable consequence of the insured's intentional act.¹⁷³ This approach focuses on what a reasonable person would view as the probable consequence of an act, rather than on the insured's subjective state of mind.¹⁷⁴ Because automobile insurance litigation is especially fact-sensitive, the question whether an insurer is relieved of his obligation to provide comprehensive coverage because the loss was not accidental must be resolved on a case-by-case basis. Neither dimension of the insured approach, when applied to cases involving losses which arise out of (1) simple traffic violations; or (2) violation of vehicle maintenance laws, should relieve an insurer

168. See *supra* note 99.

169. For the same reasons the illegal activities exclusion need not be expressly set out in the policy.

170. See *supra* note 63.

171. See *id.*

172. See *supra* note 64.

173. See *supra* note 65.

174. See *supra* note 66.

of its obligation to provide coverage. On the other hand, either dimension would relieve the insurer when the loss arises out of an insured's outright criminal act. Likewise, the second dimension could, but not necessarily, be applied to relieve the insurer of its obligation in cases involving intoxication.¹⁷⁵ This result is at least plausible because a reasonable person could view any injury resulting from an automobile wreck as a natural and probable consequence of intoxication.

The perspective of the insured approach does not exist in a vacuum; consequently, it should not be the sole consideration in determining whether a violation of an illegal activity provision relieves the insurer of its obligation to provide comprehensive coverage. The manner in which courts have treated coverage disputes involving collision insurance strongly suggests that, while maybe not as great as those concerns regarding automobile liability insurance, there are policy concerns about automobile property insurance, as well. For example, the doctrines of ambiguity, unconscionability, and reasonable expectations reflect a strong judicial policy in favor of leveling the playing field in insurance contract interpretation. Metaphorically speaking, these doctrines represent an equity continuum designed to maintain the careful balance between the interests of the insurer in freedom of contract and those of the insured in obtaining the coverage purchased. Thus, located at one end of the continuum is the doctrine of ambiguity — one of the oldest and most favored variance principles. At the other end of the continuum is the broad version of the reasonable expectations doctrine — a doctrine specifically oriented toward consumer protection. Application of these doctrines to the issue of whether a loss is accidental for purposes of comprehensive coverage is, however, no more convenient than the standpoint of the insured approach. However, the doctrines of ambiguity, unconscionability, and reasonable expectations allow courts to consider (1) the nature and type of insurance involved; (2) the purpose for which it was purchased; (3) the expectations of the insured; (4) the substantive fairness of the manner

175. As observed by a noted commentator:

Under some circumstances harm caused to the insured automobile by the insured when driving while intoxicated is classified as harm intentionally caused and recovery may be denied. Thus, it has been held that applying the rule that a party cannot insure against his own knavery as public policy does not sanction such contracts, and that this includes insurance both against the consequences of criminal acts, and against the wilful, reckless, or fraudulent acts of the insured, even though the policy does not so stipulate, it has been held that one who destroys his insured automobile by driving it while intoxicated must be regarded as having intended so to destroy it, and that the insurer is consequently relieved of liability.

18 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 74:652 (2d ed. 1983).

in which the policy was sold; (5) the commercial fairness of enforcing the restriction against the insured.¹⁷⁶

As observed earlier, "the strong public policy favoring liability insurance coverage to protect the public at large is generally absent from the analysis in the context of property insurance"¹⁷⁷ — collision and comprehensive coverages. One should not read too much into or out of this observation. The doctrines used to interpret insurance contracts and remedy egregious breaches thereof suggest that society has a strong interest in the marketing, distribution, and enforcement of insurance contracts in general. Because insurance, in general, is infected with a quasi-public interest, public policy, to some degree, is an inherent component of insurance contract interpretation.¹⁷⁸

Public policy references the law of the jurisdiction as reflected in the Constitution, statutes, or decisions of the courts.¹⁷⁹ The doctrines of ambiguity, unconscionability, and reasonable expectations are equitable concepts that reflect judicial policy. Consequently, the policy determination of whether the mere fact that (1) a vehicle has been used in an unlawful manner; or, (2) an unlawful event may have occurred during its use by the insured, should relieve the insurer of its obligation to provide comprehensive coverage depends upon a balancing of society's interest in preventing moral hazards against its interest in affording the protection provided by comprehensive coverage. In performing this balance, courts should consider (1) the parties' justified expectations; (2) the forfeiture resulting from denial of enforcement; (3) the public interest in enforcement of the particular provision.¹⁸⁰ These considerations are to be weighed against (1) the strength of the public policy, as manifested by statute and judicial decisions; (2) the likelihood that denial of enforcement will further that policy; (3) the seriousness of any misconduct involved; (4) the extent to which it was

176. See *supra* Part IV, sections A-C.

177. See *supra* note 95.

178. See Johnny C. Parker, *The Development of First-Party Extracontractual Insurance Litigation in Oklahoma: An Analytical Examination*, 31 TULSA L.J. 57 (1995).

Insurance contracts, unlike other private agreements, are unique because they implicate important public policy concerns. Consequently, the development of insurance principles and doctrines has been influenced by judicial 'perceptions about the interests of society in the resolution of the dispute.'

Id. at 59.

Finally, the insurance industry has undertaken to provide a service which affects the public interest. As a result, such contracts are viewed as a quasi-public industry — a proper subject for intense legislative and judicial regulation and scrutiny.

Id. at 62.

179. See, e.g., *American Home Assurance Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693 (Tex. App. 1987); *In re Estate of Harrington*, 648 P.2d 556 (Wyo. 1982).

180. See RESTATEMENT (SECOND) OF CONTRACTS § 178(2)(a)-(c)(1981).

deliberate; (5) the directness of the connection between that misconduct and the term.¹⁸¹ This approach evidences the generally accepted rule that a provision of an insurance contract, though unambiguous and otherwise valid, is void if the interest in enforcing the provision is outweighed by a contrary policy.¹⁸²

181. *See id.* § 178(3)(a)-(d).

182. *See id.* § 178.